86 1634
No. ——

In The
Supreme Court of the United States
October Term, 1986

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JANET BUTCHER,
Petitioner,

vs.

CITY OF DETROIT,
Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

—o—

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QUESTIONS PRESENTED FOR REVIEW

1. DO THE PROVISIONS OF DETROIT'S ORDINANCE WHICH PROHIBIT, UNDER THREAT OF PENAL SANCTIONS, THE OWNER'S SALE OF ONE OR TWO FAMILY RESIDENTIAL STRUCTURES LOCATED WITHIN THE CITY UNTIL SUCH TIME AS THE CITY ISSUES A CERTIFICATE OF INSPECTION OR AN INSPECTION REPORT AND WHICH REQUIRE PAYMENT OF INSPECTION FEES EFFECT A TAKING OF PROPERTY OF PETITIONER AND THE MEMBERS OF THE CLASS, CONTRARY TO THE PROVISIONS OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, BECAUSE PROHIBITING SALE FOR THE PURPOSE OF COERCING CONSENT TO A WARRANTLESS SEARCH IS AN IMPROPER MUNICIPAL EXERCISE OF AUTHORITY?

2. DO THE PROVISIONS OF DETROIT'S ORDINANCE, AS SET FORTH IN QUESTION 1, EFFECT A TAKING OF PROPERTY OF PETITIONER AND THE MEMBERS OF THE CLASS, CONTRARY TO THE PROVISIONS OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, BECAUSE THE FEES ARE EXACTED BY IMPERMISSIBLE DURESS?

3. DO THE PROVISIONS OF DETROIT'S ORDINANCE, AS SET FORTH IN QUESTION 1, EFFECT A DENIAL OF THE EQUAL PROTECTION OF THE LAWS TO PETITIONER AND THE MEMBERS OF THE CLASS, AND EFFECT A TAKING OF THEIR PROPERTY, CONTRARY TO THE PROVISIONS OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE OTHER SIMILARLY SITUATED PROPERTY OWNERS ARE NOT REQUIRED TO SUBMIT THEIR RESIDENCES TO

CITY INSPECTION AND ARE NOT REQUIRED TO PAY THE INSPECTION FEES?

4. DO THE PROVISIONS OF DETROIT'S ORDINANCE, AS SET FORTH IN QUESTION 1, VIOLATE THE RIGHT OF PETITIONER AND THE MEMBERS OF THE CLASS TO BE SECURE IN THEIR PERSONS, HOUSES, PAPERS AND EFFECTS, AGAINST UNREASONABLE SEARCHES AND SEIZURES, CONTRARY TO THE PROVISIONS OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION, BECAUSE THEY PURPORT TO AUTHORIZE ENTRY UPON PRIVATE RESIDENTIAL PROPERTY AND EXACTION OF FEES BY DETROIT WITHOUT A SEARCH WARRANT, WITHOUT PROBABLE CAUSE, AND BY MEANS OF DURESS?

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TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE JUDGES OF THE SUPREME COURT OF THE UNITED STATES:

JANET BUTCHER, Petitioner herein, petitions this Honorable Court for a writ of certiorari to review the orders of the Michigan Court of Appeals dated February 6, 1984 and July 11, 1986, reversing the orders of the Wayne County Circuit Court dated June 3, 1982 and November 22, 1985, respectively, that Respondent's ordinance violates the Fourth Amendment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, to the United States Constitution, and respectfully shows:

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REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS OF LOWER COURTS

1. The opinions and orders of the Wayne County Circuit Court dated June 3, 1982 (19a), and November 22, 1985 (50a), were not officially reported.

2. The opinion of the Michigan Court of Appeals reversing the Circuit Court's Order dated June 3, 1982, is reported as *Butcher v Detroit,* 131 Mich App 698 (1984). (1a).

3. The opinion of the Michigan Court of Appeals dated July 11, 1986 (10a), reversing the Circuit Court's Opinion and Order dated November 22, 1985, is reported at 156 Mich App 165 (1986).

4. Denial of Petitioner's Application for Leave to Appeal by the Michigan Supreme Court on February 10, 1987, is reported at 428 Mich 861 (1987). (58a).

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JURISDICTION OF THIS COURT

1. The grounds on which the jurisdiction of this Court is invoked are that, through enactment and enforcement of the challenged ordinance, Detroit has taken the property of Petitioner and the class without due process of law, contrary to the Fourteenth Amendment to the U.S. Constitution, by prohibiting sale of residences without prior inspection and by collection of illegal inspection fees; Detroit has deprived Petitioner and the class of their equal protection rights under the Fourteenth Amendment by applying the ordinance requiring inspections only to those one and two-family residences being transferred for a consideration; and, Detroit has violated the Fourth Amendment rights of Petitioner and the class by coercing consents to inspection and payment of illegal inspection fees under threat of, and by use of, penal sanctions, there being no claim or showing of probable cause for such inspections and Detroit having attempted to shift the burden of obtaining a search warrant from the government to the citizen.

2. The judgment sought to be reviewed was decided in two separate opinions of the Michigan Court of Appeals dated, respectively, February 6, 1984, and July 11, 1986. Under Michigan procedural rules, the first opinion and order of the Michigan Court of Appeals did not become a final judgment until issuance of the second opinion, which disposed of all the pending questions. Time of entry is not indicated on these judgments.

3. No rehearing or extension of time was sought by any party in the Michigan Court of Appeals.

4. Leave to Appeal to the Michigan Supreme Court was timely sought as to the February 6, 1984 Court of

Appeals opinion, and such leave was denied. Petitioner's request for rehearing of its order was denied by the Michigan Supreme Court on April 17, 1985. (57a).

5. Application for Leave to Appeal to the Michigan Supreme Court from both the February 6, 1984 and the July 11, 1986 opinions of the Court of Appeals was timely filed, and was denied by the Michigan Supreme Court on February 10, 1987. 428 Mich 861 (1987).

6. It is believed that 28 USCA 1257(3) confers jurisdiction on this Court to review the action of the Michigan Court of Appeals.

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CONSTITUTIONAL PROVISIONS AND ORDINANCES

1. U.S. Constitution, Am IV (60a).
2. U.S. Constitution, Am XIV, § 1 (60a).
3. City of Detroit Ordinance 124-H (60a).
4. City of Detroit Ordinance 213-H (amending 12-H) (66a).

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PETITIONER'S CONCISE STATEMENT OF THE CASE

In February of 1981, Petitioner, Janet Butcher, entered into an agreement of sale covering a single family residence owned by her in the City of Detroit, Michigan. The sale was conditioned upon the purchaser obtaining a purchase money mortgage in a specified amount. Closing of the mortgage and sale was scheduled for April 9, 1981. At the closing, the purchaser refused to complete the transaction unless and until Petitioner produced a certificate of inspection from the City of Detroit pursuant

to the ordinance in question, even though no such condition was contained in the agreement of sale and even though the lender was agreeable to closing without such certificate.

Petitioner and the purchaser subsequently orally agreed to complete the transaction, with each party to pay one-half of any repairs required by Detroit. Petitioner requested an inspection, paid the inspection fees, and a report was made by city inspectors indicating repairs necessary in the approximate amount of $995. The repairs were completed by Petitioner, the sale was closed, and the purchaser has failed and refused to pay any portion of the required repairs. Thus, Petitioner has been required to pay an inspection fee of $110, and repairs of $995, not contemplated by the parties when the agreement of sale was executed.

Petitioner, individually and as the representative of the class, instituted suit in the Wayne County, Michigan, Circuit Court, alleging that Ordinance No. 124-H (60a), as amended by Ordinance 213-H (66a) adopted by the Respondent, City of Detroit (hereinafter "Detroit"), is unconstitutional and void. That ordinance declares it to be unlawful to sell or transfer, or act as a broker for a sale or transfer of a dwelling located within the City of Detroit, unless the seller provides a valid certificate of approval or a valid inspection report issued by Detroit, with minor exceptions not pertinent hereto. The ordinance requires the payment of a fee (currently $120 or more) in order for a person to obtain either a certificate of approval or an inspection report from Detroit. A "dwelling" is defined in the ordinance to mean a 1 or 2 family residential structure.

Thus, the ordinance makes it illegal to sell or transfer any interest in any 1 or 2 family residential structure located in the City of Detroit without first paying Detroit an inspection fee and obtaining either the inspection report or the certificate of approval from the city.

Under the ordinance scheme, no 1 or 2 family residential structure located in Detroit can be sold or transferred unless:

(a) A valid certificate of approval is tendered to the purchaser or transferee at the time of the sale or transfer, § 12-7-2(a) or

(b) A purchaser waives tender of a certificate of approval after having received a valid inspection report at least ten days prior to the sale or transfer, and the property is Non-Investment Property, as defined in the ordinance, § 12-7-2(b) or

(c) An affidavit is filed that the property will not be occupied until a valid certificate of approval or a temporary occupancy permit is issued by Detroit, where the transferee does not intend to occupy the property and where the owner states any required rehabilitation permit will be obtained, § 12-7-2(c) or

(d) The transferor is a governmental agency which furnishes a valid inspection report to the transferee at least 10 days prior to the transfer and the transferee certifies by affidavit that he will not occupy the property, or allow others to do so, without first obtaining a certificate of approval or a temporary occupancy permit from Detroit, § 12-7-2(d).

A transfer of title without consideration is not prohibited by the ordinance.

The State Housing Law (hereinafter sometimes referred to as "S.H.L.") provides minimum housing standards applicable to every residence located within Detroit. The subject ordinance is not a substitute for the S.H.L. The ordinance housing standards do not apply to all residences within the city. They do not apply to all one or two family dwellings. The standards contained in the ordinance are different from those contained in the S.H.L.; they are different from those contained in Detroit's own building code; and, they can only be enforced against homes which are currently being sold. It is no violation of the ordinance to either live in or maintain a house which does not meet ordinance standards because the ordinance does not apply to homes not being sold.

On May 26, 1982, the Circuit Court, Honorable John H. Hausner, concluded its hearing on Petitioner's Motion for Partial Summary Judgment and determined that Ordinance No. 124-H, as amended by Ordinance 213-H adopted by Detroit, is unconstitutional and void. See Order entered by the Court on June 3, 1982.

The Circuit Judge did not issue a formal opinion. Instead, he indicated on the record (p 35, transcript of 5-26-82; p 6, transcript of 6-3-82) that he agreed with and adopted the reasoning and citations set forth in Petitioner's Motion for Partial Summary Judgment and supporting Brief. The essence of that argument was that the government has no authority under our Constitutions to either prohibit or inhibit the sale of a party's interest in real estate for the purpose of enforcing the occupancy provisions of a local housing ordinance or the State Housing Law; that the equal protection clauses of the Constitutions do not permit the limited application of the ordinance

to 1 and 2 family dwellings, as opposed to multiple family dwellings, nor do the equal protection clauses permit the selective application of the ordinance to only those 1 and 2 family dwelling properties which are proposed to be sold; and, in any event, the State of Michigan has neither expressly nor impliedly delegated to home rule cities the power to either regulate or prohibit the sales of 1 or 2 family residential structures within their boundaries. Fourth Amendment and Michigan search and seizure provisions were also alleged to be violated.

The Court, in its Order of June 3, 1982, also enjoined Detroit from further enforcement of the ordinance in question, as originally adopted, or as subsequently amended. Discovery proceedings indicate that more than 70,000 persons have paid the ordinance fees to Detroit, so that Detroit has collected perhaps $8,000,000 under the ordinance. The action was certified as a class action by order entered April 23, 1982.

On or about June 10, 1982, Detroit filed a claim of Appeal with the Michigan Court of Appeals. Under date of July 23, 1982, the Court of Appeals issued its Order, granting Detroit's "Application for Leave to Appeal" (even though no Application for Leave to Appeal had ever been filed) and staying the Order of the Circuit Court dated June 3, 1982.

Under date of February 6, 1984, the Court of Appeals issued its opinion, reported at 131 Mich App, 698 (1984) (1a); 347 NW2d 702, reversing the judgment of the Trial Court and remanding for further proceedings. Under date of Sept. 7, 1984, the Michigan Supreme Court denied Petitioner's Application for Leave to Appeal from the February 6, 1984 decision. Under date of April 17,

1985, the Michigan Supreme Court denied Petitioner's Motion for Reconsideration of her Application for Leave to Appeal from the February 6, 1984 opinion, stating:

> "On order of the Court, the motion for reconsideration of this Court's order of September 7, 1984 is considered, and it is DENIED, because it does not appear that the order was entered erroneously. On remand, the trial court must still consider the remaining challenges of the plaintiff to the ordinance." (57a).

On remand, the Trial Judge again granted Petitioner's Motion for Partial Summary Judgment (50a), on the grounds that:

1. The ordinance violated the equal protection clauses of the State and Federal Constitutions.

2. The ordinance violated the search and seizure provisions of the State and Federal Constitutions.

3. The exactions of the inspection fees under the duress of this unconstitutional ordinance constituted takings of property without due process of law in violation of the State and Federal Constitutions. The Court dictated its bench opinion under date of November 15, 1985. (23a).

The Trial Court's Order from which appeal as of right was claimed by Detroit was entered on November 22, 1985. In that Order, the court ordered the return of all inspection fees to each member of the class and issued its injunction prohibiting Detroit from further enforcement of the ordinance.

On that same day, November 22, 1985, Detroit filed its claim of appeal with the Court of Appeals with another request that the Trial Court's Injunctive Order be stayed. A Panel of the Court of Appeals issued its Order staying the enforcement of the Trial Court's injunction on December 2, 1985.

On July 11, 1986, the Court of Appeals issued its opinion and order reversing the Trial Court's Order of November 22, 1985 (10a). This opinion is reported at 156 Mich App 165 (1986). Petitioner timely sought leave to appeal to the Michigan Supreme Court from the holdings of the two Court of Appeals Panels. The Michigan Supreme Court issued its Order denying Petitioner's Application for Leave to Appeal on February 10, 1987, Justice Boyle voting to grant leave. (58a).

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BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE AND IN THE MICHIGAN APPELLATE COURTS

Suit was instituted in Michigan's Wayne County Circuit Court asserting that, in light of this Court's 1967 opinions in *Camara v Municipal Court,* and *See v City of Seattle,* cited infra, p 14, Detroit's point-of-sale inspection ordinance violates the Due Process Clauses, the Equal Protection Clauses, and the Search and Seizure provisions of both the Michigan and the U. S. Constitutions.

Every pleading filed by Petitioner raised the federal questions encompassed by the Statement of Questions Involved contained within this Petition. In its Order of June 3, 1982, the Trial Court granted Petitioner's Motion for Partial Summary Judgment, saying (20a):

> "IT IS HEREBY ORDERED AND ADJUDGED, and the Court does hereby determine, that Defendant's Ordinance No. 124-H, as adopted and as amended by Ordinance No. 213-H, is unconstitutional and void, in that the adoption and subsequent enforcement of said ordinance(s) constituted a taking of the property of Plaintiff and the members of the class without due process of law, contrary to Sec. 17 of Art. I of the Michigan Constitution of 1963 and the 14th Amendment to the United States Constitution and, further, that Defendant was, under the law of the State of Michigan, with-

out either express or implied authority or delegated authority to either regulate or restrict the sales of one or two family residential structures within its boundaries, and certainly not for the purposes which are claimed or appear on this record;"

The Court of Appeals reversed, on February 6, 1984, saying (8a):

"In the present case, the ordinance neither destroys nor reduces the property's value. In fact, if anything, by requiring post-inspection repairs, it enhances value. Rather than preventing the owner from enjoying his or her property, it merely imposes an inspection and a fee. Such a burden on the property holder is light. The inhibition is not on the transfer of property but upon the failure to have the home inspected.

. . .

The ordinance does not amount to an unconstitutional taking of property without due process."

The Michigan Supreme Court, instead of granting leave to appeal, remanded on April 17, 1985, saying (57a):

"On order of the Court, the motion for reconsideration of this court's order of September 7, 1984 is considered, and it is DENIED, because it does not appear that the order was entered erroneously. On remand, the trial court must still consider the remaining challenges of the plaintiff to the ordinance."

On remand, the Trial Court on November 22, 1985, held (51a):

"IT IS HEREBY ORDERED AND ADJUDGED, and the Court does hereby determine, that Defendant's Ordinance No. 124-H, as adopted and as amended by Ordinance No. 213-H, is unconstitutional and void, in that the adoption and subsequent enforcement of said ordinance(s) constituted a taking of the property of Plaintiff and the members of the class without due process of law, contrary to Sec. 17 of Art. I of the Michigan

Constitution of 1963 and the Fourteenth Amendment to the United States Constitution. Such unconstitutional taking of property without due process of law was accomplished by Defendant by denying to Plaintiff and each member of the class the equal protection of the laws guaranteed them by Sec. 2 of Art. I of the Michigan Constitution of 1963 and the Fourteenth Amendment to the United States Constitution by designating as being subject to the said ordinance(s) only those persons who transfer title to real property within the Detroit city limits for a consideration, and where the purchaser has not resided on the purchased premises for more than 12 months prior to the date of transfer, and has not otherwise waived compliance with the ordinance. The Court finds the selection and designation of such class, which produces approximately 12,000 inspections per year in a city which has more than 350,000 one and two family residential structures, to be completely without any rational basis under whatever equal protection test or review standard the court employs. Alternatively, under Defendant's claim that the class is comprised of owners of one and two family residential structures, it is obvious that not all members of the class are being equally treated under the ordinance(s), either as to the requirements for inspections or subsequent occupancy, which provisions facially violate both constitutional equal protection clauses.

IT IS FURTHER ORDERED and determined by this Court that the subject ordinance, and as amended, violates Sec. 11 of Art. I of the Michigan Constitution of 1963 and the Fourth Amendment to the United States Constitution, each of which protects the people from unreasonable searches and seizures of their persons, houses, papers and possessions, in that Defendant by such ordinance(s) attempts to legislate unto itself a right of entry onto private residential property and a right to collect an uncontrolled inspection fee without first establishing before a neutral magistrate probable cause to enter upon and search each individual premises, and thereby accomplishes an unconstitutional taking of property without due process of law. Defen-

dant impermissibly provides in the ordinance for enforcement of its provisions by penal sanctions, consisting of possible fines and/or imprisonment, and by civil sanctions, consisting of imposing implied warranties as to the condition of premises, where the property owner transfers title for a consideration without first having obtained an inspection certificate and without paying the specified inspection fee.

A person may not be penalized or disadvantaged for exercising a constitutional right. The government may not lawfully anticipate the issuance of a search warrant and thereby circumvent the judicial review mandated by each constitution. Whether or not any unit of government attempts to establish in the abstract an administrative standard which could serve as a basis, in lieu of probable cause, for permitting an administrative inspection of residential premises, such administrative standard is, at most, only a guide or an additional fact to assist the magistrate in acting upon any facts presented in support of any request for a search warrant presented to such judicial officer.

The Court having determined that the imposition and collection of the inspection fees from each member of the class heretofore certified by the Court was an unconstitutional taking of property without due process of law which was accomplished in violation of the equal protection clauses of both the State and the Federal Constitutions and in violation of the search and seizure clauses of both such constitutions, and further, that the imposition and collection of such fees was accomplished by impermissible duress, IT IS HEREBY ORDERED that Defendant City of Detroit is liable to repay to each and every member of the class the inspection fees collected by it pursuant to either Ordinance 124-H as amended by Ordinance 213-H, with statutory 12% judgment interest from the date of institution of this suit or, as to inspection fees paid after the date of institution of this suit, from the last day of the month in which the payment of each later inspection fee was received by Detroit, such interest to be compounded annually as provided by statute."

The Michigan Court of Appeals reversed on July 11, 1986:

A. As to due process (12a):

"In addressing this case for the second time on appeal, we first note that the trial judge erred in finding that defendant city's ordinance constitutes a taking of property without due process of law, in violation of the US Const, Am XIV and Const 1963, art 1, § 17. This court completely reviewed and rejected this claim in the prior opinion issued in this case. Thus, the trial judge could not, upon remand, properly base his grant of summary judgment to plaintiff on this rejected claim."

B. As to equal protection (15a):

"In light of our discussion above, which clearly indicates that the classifications in the ordinance are rationally related to legitimate government interests, we conclude that the trial judge erred in finding that plaintiff, prior to presenting any proofs in this matter, had overcome the presumption of the ordinance's validity and had met the burden of showing that the ordinance was without reasonable justification. In fact, we find that there is no genuine issue of material fact that the classifications in the ordinance are rationally related to a legitimate government interest and further find that plaintiff could not possibly overcome the presumption of the ordinance's constitutional validity at trial. Therefore, we conclude that defendant city is entitled to judgment as a matter of law on plaintiff's equal protection claim."

C. As to search and seizure (16a):

"Thus, it appears that defendant's ordinance, despite the provision allowing an owner-seller to demand a search warrant, compels the seller to choose between a warrantless search or no search at all and, thus, no possibility of a legal sale. The right to require a warrant in such a situation,

where the owner needs the inspection before he can legally sell the structure, becomes rather meaningless.

However, the safeguards provided by a warrant in the situation presented by the inspections required under defendant's ordinance are also meaningless. . . . we conclude that the inspection process itself effectively provides the assurances and safeguards of a warrant and renders the procurement of a search warrant unnecessary."

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ARGUMENT

Petitioner urges that this Court allow the issuance of a writ of certiorari in this matter for the following reasons:

1. The decision of the Michigan Court of Appeals constitutes a complete and total perversion of the applicable federal constitutional provisions as settled by prior decisions of this Court. The Trial Court specifically (24a) grounded his opinion on the opinions of this Court in *Camara v Municipal Court,* 387 US 523; 87 S Ct 1727 (1967); and the companion case of *See v Seattle,* 387 US 541; 87 S Ct 1737 (1967), decided the same day. Some obvious differences between federal law, as determined by this Court, and federal law, as determined by the Michigan Court of Appeals, are:

A. Under *Camara* and *See,* and the Fourth Amendment, the initiative for obtaining a search warrant rests with the government. Under Detroit's ordinance, the burden is on the property owner; *First,* to report any imminent sale of his property; *Second,* to pay an inspection fee; and, *Third,* to "invite" the municipal inspector into the house. The owner is given the right to demand a search warrant under Sec. 12-7-4 of the ordinance, which provides (69a):

> "The department shall advise the seller, transferor or the occupant of a dwelling which must be inspected pursuant to the provisions of this ordinance that he or she has the right to refuse entry to the department without a search warrant."

In effect, Detroit attempts to substitute the search warrant rights it grants under the ordinance for those reserved by the citizenry under the State and Federal Constitutions. The Court of Appeals failed to understand, acknowledge, or discuss the fundamental differences between the ordinance and constitutional search warrant provisions. The government cannot place the onus of obtaining an inspection on the owner, where the Constitution places that burden on the government.

B. Under *Camara* and *See,* a reduced standard of probable cause was approved by the court for building ordinance inspections, where legislative standards applicable to all have been established, which standards are to be considered by the magistrate in acting upon a request for a warrant. 87 S Ct, at p 1736. In this case, the existence of probable cause where a sale of a residence is proposed is apparently presumed by the Court of Appeals, for it never discusses the question of *whether* probable cause exists and it clearly indicates that the magistrate would have no ground for refusing to issue a warrant sought by the city. In effect, the existence of probable cause is transformed under the ordinance from a judicial determination to a legislative determination. The "unlimited discretion" of the official in the field found objectionable by this Court in *Camara*, p 1733, does not become ac-

ceptable when replaced by the unlimited discretion of the Legislature.

C. In reaching its decision, the Michigan Court of Appeals stated (16a):

> "Thus, it appears that defendant's ordinance, despite the provision allowing an owner-seller to demand a search warrant, compels the seller to choose between a warrantless search or no search at all and, thus, no possibility of a legal sale. The right to require a warrant in such a situation, where the owner needs the inspection before he can legally sell the structure, becomes rather meaningless.
>
> However, the safeguards provided by a warrant in the situation presented by the inspections required under defendant's ordinance are also meaningless. . . . we conclude that the inspection process itself effectively provides the assurances and safeguards of a warrant and renders the procurement of a search warrant unnecessary."

The holding of the Court of Appeals that the safeguards provided by the ordinance are sufficient to avoid the Fourth Amendment warrant requirement was raised and rejected by this Court, in *Camara*, 87 S Ct, at p 1732. It said:

> "Unless the magistrate is to review such policy matters, [area conditions], he must issue a 'rubber stamp' warrant which provides no protection at all to the property owner."

As to legislative safeguards, this Court said, p 1733:

> ". . . broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may only be invoked at the risk of a criminal penalty."

Almost identical legislative safeguard arguments were made by the Secretary of Labor to this Court,

and rejected by it, in *Marshall v Barlow's, Inc.*, 436 US 307; 98 S Ct 1816; 56 L Ed2d 305 (1978) wherein the Secretary, 98 S Ct, at p 1822 asserted:

> "... that the enforcement scheme of the Act requires warrantless searches, and that the restrictions on search discretion contained in the Act and its regulations already protect as much privacy as a warrant would."

The Secretary argued that, whatever the general rule against warrantless searches might be, the warrantless search in question was "reasonable". In rejecting the Secretary's argument, this Court stated, 98 S Ct, at p 1825:

> "Nor do we agree that the incremental protections afforded the employer's privacy by a warrant are so marginal that they fail to justify the administrative burdens that may be entailed. The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search. A warrant, by contrast, would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria. Also, a warrant would then and there advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed. These are important functions for a warrant to perform, functions which underlie the Court's prior decisions that the Warrant Clause applies to inspections for compliance with regulatory statutes. [Citing *Camara* and *See*]. We conclude that the concerns expressed by the Secretary do not suffice to justify warrantless inspections under OSHA or vitiate the general constitutional requirement that for a search to be reasonable a warrant must be obtained."

D. In *Camara* and *See,* this Court reaffirmed its prior decisions that "absent exigent circumstances, any warrantless search is an unreasonable search" 87 S Ct, at p 1731, either as to residences, *Camara,* or as to business premises. *See.* In this case, the Court of Appeals overturned the Trial Court's holding that the ordinance authorized an unreasonable search (15a), even though Detroit has never asserted that exigent circumstances existed to justify its warrantless searches.

If the decision of the Court of Appeals is correct, then searches in anticipation of a prospective sale of residential property, in addition to searches made under exigent circumstances, are "reasonable", and can be made without prior procurement of a search warrant. Thus, despite the holdings of this Court in *Camara* and *See,* the citizens of Michigan end up with a judicial erosion of their constitutional rights "to be secure . . . in their houses." If "point-of-sale" is equivalent to Fourth Amendment "probable cause" in Michigan, it constitutes a similar equivalent in the other 49 states.

E. In *Camara* and *See,* this Court was careful to point out that there was to be no reduced standard of probable cause for any inspection other than a building code occupancy ordinance, 87 S Ct, at p 1734. In this case, the Court of Appeals panel acknowledged that the classifications, exclusions and exemptions of the ordinance "are especially related to the legitimate purpose of protecting buyers from latent housing defects and from fraud on the part of the seller." (14a). Any inspection for the purpose of discovering or preventing criminal fraud could only be made after is-

suance of a warrant based upon an unreduced standard for determination of probable cause. The Court of Appeals did not even consider whether probable cause exists under Detroit's ordinance.

F. The ordinances in *Camara* and *See* did not attempt to prevent the owner from selling or to require an inspection as a condition of sale. The Court of Appeals could find no prior decision by any appellate court in this country upholding a restriction on sale similar to the Detroit ordinance provision. It ignored, or at least refused to discuss, the case of *Wilson v Cincinnati,* 46 Ohio St. 2d 138; 246 NE2d 666 (1976), which case has been cited to all courts. The *Wilson* case, finding such a provision to be in violation of the Fourth Amendment and the decisions of this Court in *Camara* and *See,* stated, 246 NE2d, at p 671:

> "As applicable to the instant facts, the import of *Camara* is that the Fourth Amendment prohibits placing appellant in a position where she must agree to a warrantless inspection of her property or face a criminal penalty. *Therefore, where a municipal ordinance requires the owner of real property to tender a certificate of housing inspection to a prospective buyer, and such certificate may be obtained only by allowing a warrantless inspection of the property, the imposition of a criminal penalty upon the owner's failure to tender the certificate violates the owner's rights under the Fourth Amendment to the United States Constitution.*" (Emphasis supplied).

2. Detroit's ordinance on its face violates the Due Process Clause by purporting to restrict or prohibit the sale of property. Petitioner would request the Court to consider:

A. Both panels of the Michigan Court of Appeals apparently recognized this fact. The first panel got around the provisions of the Due Process Clause by *denying* that the ordinance affected the transfer of property, stating, p 8a:

> "Rather than preventing the owner from enjoying his or her property, it [the ordinance] merely imposes an inspection and a fee. Such a burden on the property holder is light. The inhibition is not on the transfer of property but upon the failure to have the home inspected."

This, despite the fact that the ordinance is entitled "Restriction on Sales or Conveyance of One or Two Family Dwellings", and the purpose clause states that it is "an ordinance . . . prohibiting the sale or conveyance of one (1) or two (2) family dwellings without either a certificate of approval . . .", and despite the fact that § 12-7-10 provides:

> "Any sale or transfer in violation of this ordinance shall be illegal. Any sale or transfer in violation of this ordinance or any failure to adhere to statements, made in the waiver of compliance form . . . shall be a misdemeanor." (65a).

The first panel reasoned that if there were no "inhibition" on the transfer, there could be no "taking", an eminently reasonable logical conclusion, if the first premise were correct.

B. The second panel of the Court of Appeals had no illusions about whether or not Detroit's ordinance inhibited or prohibited the sales of property. It recognized that sales made without compliance with the ordinance were "illegal" sales (11a), but deferred to the prior decision of the first panel on the point (12a).

C. Petitioner argued that the adoption of the ordinance constituted an impermissible constitutional taking because every single and two family residence within the city was affected thereby from the date of adoption. It cannot possibly be a crime in this country for the owner to sell a residence which complies with every state, local, and federal requirement to permit occupancy. Yet, Detroit has forbidden the sale of each and every one and two family residence, upon threat of fine and/or imprisonment or both, until the structures have been inspected, the inspection fees paid, and the certificates of inspection issued. Detroit is making its property owners, prior to sale, prove that they are not in violation of the ordinance, whereas the Constitution places the burden of proof for violation of a penal law or ordinance upon the government.

D. Detroit's ordinance also violates the Due Process Clause by improperly restricting the sale of houses for the purpose of enforcing housing occupancy laws and ordinances.

Of this tactic, the Court, in *Currier v Pasadena,* 48 Cal App 3d 810, 816 said:

> "To compel a property owner to let his property lie vacant and to prohibit him from selling it, unless he 'consents' to a warrantless search is to require an involuntary consent. The owner's basic right to use and enjoy the fruits of his property cannot be conditioned on his waiving his constitutional rights under the Fourth Amendment and under article I, section 13, of the California Constitution."

E. While neither Court of Appeals panel commented on the point, it appears obvious that, if the

Detroit ordinance is unconstitutional, the provision contained therein requiring payment of inspection fees is also unconstitutional. This was the holding of the Trial Court.

3. Detroit's ordinance on its face violates the Fourth Amendment to the U.S. Constitution.

A. Since no exigent circumstances have been alleged by Detroit or declared by the Court of Appeals, Detroit's ordinance violates the Fourth Amendment because it does not provide for the securing of a warrant by the city or for a determination of probable cause. The mere prospect of a sale of a residence is not sufficient to establish probable cause for the issuance of a warrant by a magistrate. Obviously, any such claim would be nonsense.

B. If this Court were to take the first Court of Appeals panel at its obviously incorrect word that "the inhibition is not on the transfer of property but upon the failure to have the home inspected." (8a, and citation above), then the Detroit ordinance would have the effect of imposing penal sanctions on a property owner who refuses either to obtain or permit a warrantless inspection of his property. This Court specifically held in *Camara* that a property owner could not be subject to a penal sanction for asserting a constitutional right. 87 S Ct, at p 1737; also, in *See,* 87 S Ct, at p 1741.

C. The second panel of the Court of Appeals based its decision that there was no Fourth Amendment violation on the decisions in *Hometown Co-Operative Apartments v City of Hometown,* 515 F Supp 502, 504 (N.D. Ill, 1981); and *Dome Realty Inc. v City of Paterson,* 83 NJ 212, 239-241; 416 A2d 334 (1980),

even though it recognized that the factual situations were not identical. *Hometown* involved an inspection requirement before a residence could be *occupied,* not before it could be sold, while *Dome* required an inspection before a landlord could relet rental premises. Obviously, neither of these cases is applicable to the facts of this case. Neither ordinance purported to inhibit or prohibit sales of the residences. The significant observation regarding these cases is that in *Hometown,* it would be the *purchaser* who would have the obligation to obtain the inspection, as a precondition to occupancy, while in *Dome,* the requirement of inspection would appear to be the regulation of a business activity subject to constitutional tests relating to such activities. Whether the *Paterson* or *Hometown* ordinances violate the Fourth Amendment is not at issue in this case.

D. The Court of Appeals stated (17a) "an inspection under the ordinance only occurs when the owner-seller requests one." As noted, this is not a proper factual scenario under the Fourth Amendment. The citizen cannot violate the Fourth Amendment by failing to report a prospective sale of his house, by failing to pay an inspection fee, or by failing to request and/or obtain an inspection. He cannot violate the Fourth Amendment by doing nothing. Absent exigent circumstances, a citizen can violate the Fourth Amendment only by obstructing or failing to permit entry upon his property after being presented with a validly issued search warrant.

E. "Point-of-sale" does not qualify as a valid substitute for probable cause, nor does it qualify as a reduced standard of probable cause. The Court of Appeals did not discuss whether probable cause exists

where a home is proposed to be sold, which would justify issuance of a search warrant, under either the Fourth Amendment or under Detroit's ordinance. It seems to have held that, absent the ordinance provision, a warrantless search is not a "reasonable" search, because "the inspection process itself effectively provides the assurances and safeguards of a warrant and renders the procurement of a search warrant unnecesessary."

If it had been the intent of the people, in adopting the Fourth Amendment, to permit substitution by the government of an inspection procedure "just as good" as the warrant review and issuance procedure set out in the amendment, they could have easily included such a provision.

Point-of-sale would not qualify as a proper legislative standard under this Court's decision in *Camara,* which was concerned with the balancing of the need for the inspection against the invasion which the search entails. See the citation from 87 S Ct, at p 1734, supra. The point-of-sale classification was not designed to, and does not, result in "routine periodic inspections of all structures."

4. Detroit's ordinance on its face violates the Equal Protection Clause of the Fourteenth Amendment. This is so because Detroit is attempting to enforce its occupancy ordinances by placing the burden of obtaining inspections, making repairs, and paying inspection fees only on properties being sold, while leaving all other one and two-family residences free of the ordinance requirements. In effect, Detroit's ordinance constitutes an "exit tax" upon those persons selling their homes and leaving the city. There is no inspection activity by the City, nor has there

been any for years, except inspections made under the challenged ordinance.

The Michigan Court of Appeals reviewed the equal protection question along traditional classification lines as if this were the dispositive issue. It decided that "point-of-sale" classification produced a reasonable class under the Fourteenth Amendment which would satisfy the particularized determination of probable cause, as to each house, required by the Fourth Amendment.

What this Court did in *Camara* and *See* was to strike a balance between these two constitutional limitations. This Court held that the particularized finding of probable cause could be made by the magistrate where there was some justifiable basis for inspecting all of the homes within the class—i.e., all homes in the city or area, all apartments, all homes of a certain age, all homes in an obviously declining area, 87 S Ct, at p 1736,—but that the classification itself is subject to review by the magistrate.

The Trial Court reasoned that the fact of a prospective sale was not a reasonable basis for singling out selling homeowners for the purpose of enforcing occupancy laws and ordinances (52a), and, therefore, could not form the basis for a determination of probable cause, either as to one house or as to all homes proposed to be sold. He stated that:

> ". . ., under that ordinance it defies logic to show the reasonable classification is that you check the homes that are sold for a consideration only in which the buyer doesn't waive it or it hasn't been occupied for a year when its given for, without consideration. . . . there is no basis in reason to think that people who sell houses for a consideration are more likely to have homes that cannot meet the minimum standard or more likely to convey fraudulently than people who get houses by the other methods." (42a).

The Trial Court also held (42a) that "There is no basis in reason as far as I can determine that the goal of the ordinance will be accomplished by this method." The Court pointed out that some homes could be required to be inspected as much as 12 times per year if they are sold that many times, while other homes might never be required to be inspected. Similarly, at the rate of inspections revealed by Detroit in discovery, it would take approximately 27½ years for each residence to be inspected under this method, assuming each house were sold only once.

Detroit has abandoned its housing inspection program under the State Housing Law, and it has abandoned its inspection program under its own building code. The housing standards used by the inspectors under this ordinance are standards set forth in the ordinance (64a), and *are not* either the minimum standards set forth in the S.H.L. or in the Detroit Building Code.

Most of Detroit's residential structures have been in place for more than 50 years. Many, or most, of these structures were modest even by the standards in force at the time of construction. Thousands upon thousands of such remaining structures are marginally habitable. Equally as many are not habitable at all. Under a recently reported estimate by one of the metropolitan newspapers, Detroit is the largest land owner of properties within its boundaries. It has reportedly acquired more than 34,000 properties by the simple expedient of obtaining tax titles on properties as they are abandoned. It reportedly has a constant backlog of about 5,000 abandoned buildings. *Detroit News,* March 21, 1987.

The result of the deliberate inaction of Detroit and the State of Michigan in failing to enforce the State Hous-

ing Law and the Detroit Building Code provisions is predictable and two-fold:

> A. If it is uneconomical to repair a residence, the property is sooner or later abandoned by the owner and then claimed on tax sale by Detroit.
>
> B. No investor or devoloper or land owner will build new residences anywhere in the city, leaving a municipality more desolate in certain sections than many of the cities of Europe which were ravaged by enemy bombs in World War II.

The Court of Appeals held (13a):

> "The classifications, exclusions and exemptions are rationally related to these legitimate government purposes of the ordinance. They are especially related to the legitimate purpose of protecting buyers from latent housing defects and from fraud on the part of a seller.",

when what Detroiters really need is protection from their own government. If Detroit had enforced the State Housing Law and its own building code during these past 40 years, it would have an accurate record as to the condition of each and every home within its boundaries. The only possible positive result, if Detroit is permitted to continue inspecting only houses being sold, is that the uninspected houses should fall down sooner, thus eliminating those dangers to the public in a shorter time. Petitioner parenthetically notes that on Thursday, March 12, 1987, Detroit experienced the worst fires in its history when several abandoned commercial structures burned. Three firemen lost their lives while fighting the blaze. Equally serious safety and fire hazards exist throughout the city because Detroit simply cannot knock the houses down as fast as they are abandoned.

In *Camara,* 87 S Ct, at p 1734, this Court stated:

"In determining whether a particular inspection is reasonable—and thus in determining whether there is probable cause to issue a warrant for that inspection —the need for the inspection must be weighed in terms of these reasonable goals of code enforcement.

There is unanimous agreement among those most familiar with this field that the only effective way to seek universal compliance with the minimum standards required by municipal codes is through routine periodic inspections of all structures. It is here that the probable cause debate is focused, for the agency's decision to conduct an area inspection is unavoidably based on its appraisal of conditions in the area as a whole, not on its knowledge of conditions in each particular building. . . . [p 1735]

Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails. . . .

Second, *the public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results. . . . Finally, because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy.* Both the majority and the dissent in *Frank* emphatically supported this conclusion:

'Time and experience have forcefully taught that the power to inspect dwelling places, either as a matter of systematic area-by-area search or, as here, to treat a specific problem, is of indispensable importance to the maintenance of community health; a power that would be greatly hobbled by the blanket requirement of the safeguards necessary for a search of evidence of criminal acts. The need for preventive action is great, and city after city has seen this need and granted the power of inspection to its health officials; and these inspections are apparently welcomed by all but an insignificant few." (Emphasis supplied).

The only classifications which could satisfy the Equal Protection mandate of the Constitution justifying application of a reduced or substituted basis for probable cause under the Fourth Amendment, are classifications which contemplate enforcement against each and every similar residence, on some regular and systematic basis. Detroit's "point-of-sale" ordinance does not require inspections of, or apply occupancy standards to, all one and two-family residences, either before or after sale. Point-of-sale is an improper classification because it does not establish probable cause which would justify issuance of a warrant, either on an individual residence basis, or upon the basis of the entire class.

CONCLUSION

In 1967, in this Court's decisions in *Camara* and *See,* it was reestablished that the Fourth Amendment applied to municipal inspections being conducted in both residences and commercial structures for the purpose of enforcing occupancy ordinances and building codes. Under the Fourth Amendment, assuming no exigent circumstances, the government could secure entry onto private premises for the purpose of making these inspections either by obtaining the consent of the property owner or by obtaining a search warrant based upon probable cause, or proper substitute legislative standards.

Less than 20 years later, the first level Michigan Court of Appeals holds that the Fourth Amendment does not apply to these municipal inspections if the municipality, by ordinance, transfers the burden of obtaining the search warrant from the government to the property owner where he proposes to sell his residence. Moreover, because the Detroit property owner is given the right and duty to re-

quest a warrant, that grant by Detroit "renders the procurement of a search warrant unnecessary." (17a).

What the Court of Appeals obviously failed to perceive is that none of the considerations cited by it presents or creates any "exigent circumstances" justifying a warrantless intrusion upon private property, and none of the foregoing, including the prospect of sale, establishes probable cause which would permit of issuance of a warrant under the Fourth Amendment.

It is the presence of probable cause, and not the absence of inconvenience to the citizen, which determines whether a search warrant may issue. It is a judicial determination whether probable cause exists as to a particular house, not a legislative determination. The specific holding of this Court in *Camara* and in *See* was that, even if the definition of probable cause were somewhat relaxed in connection with these municipal inspections, still each citizen was entitled to an individual judicial determination of probable cause and the need for issuance of a search warrant, before his residence could be inspected.

It was also the holding of this Court that a property owner could not be convicted for refusing to consent to the inspection *(Camara)* or for insisting that the inspector obtain a warrant authorizing entry *(See)*. Detroit cannot gain entry to these homes by punishing the citizen's failure to obtain an inspection or by prohibiting sale of uninspected homes.

Respectfully submitted,

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APPENDIX

State of Michigan Court of Appeals

JANET BUTCHER,

Plaintiff-Appellee,

v

Docket No. 64900

CITY OF DETROIT,
a municipal corporation,

Defendant-Appellant.

_____/

(Filed Febr. 6, 1984)

BEFORE: M. J. Kelly, P.J., Harold Hood and J. H. Shepherd, JJ.

H. HOOD, J.

On June 3, 1982, the trial court granted partial summary judgment for plaintiff. It held that defendant's ordinance requiring inspection for one and two-family dwellings is unconstitutional. Defendant appeals by leave granted.

Basically, defendant's ordinance, 124-H, §§ 12-7-1, *et seq.*,[1] requires a valid certificate of approval or a valid inspection report from defendant before a person may sell or transfer a one or two-family residential structure in the city. It also authorizes an inspection fee.[2]

On June 10, 1981, plaintiff sued[3] defendant alleging that the ordinance is invalid for numerous reasons, including: (1) the city was without authority to regulate

such sales and to demand an inspection fee; (2) the ordinance violated equal protection; (3) the ordinance amounted to an unconstitutional taking of property without due process; (4) the ordinance authorized an unconstitutional search and seizure.

In its order granting partial summary judgment, the trial court ruled that the ordinance:

> "constituted a taking of property of Plaintiff and the members of the class without due process of law, contrary to Sec. 17 of Art. I of the Michigan Constitution of 1963 and the 14th Amendment to the United States Constitution and, further, that Defendant was, under the law of the State of Michigan, without either express or implied authority or delegated authority to either regulate or restrict the sales of one or two family residential structures within its boundaries, and certainly not for the purposes which are claimed or appear on this record; * * *."

We disagree on both counts. First, we believe that defendant does have the power to enact such an ordinance. Second, the ordinance does not constitute an unconstitutional taking of property without due process.[4]

DEFENDANT'S AUTHORITY TO ENACT ORDINANCE 124-H §§ 12-7-1, ET SEQ.

Generally, "[t]he police power rests in the State." *Attorney General ex rel Lennane v Detroit,* 225 Mich 631, 638; 196 NW 391 (1923). This power belongs to a municipality only if specifically conferred on it by statute or by the Constitution. *Clements v McCabe,* 210 Mich 207, 215; 177 NW 722 (1920); *Kalamazoo v Titus,* 208 Mich 252; 175 NW 480 (1919).

The 1908 Constitution, however, changed the role of the municipality in our governmental life in this State. Const 1908, art VIII, § 21 stated:

> "Under such general laws, the electors of each city and village shall have power and authority to frame, adopt and amend its charter and to amend an existing charter of the city or village heretofore granted or passed by the legislature for the government of the city or village and, through its regularly constituted authority, to pass all laws and ordinances relating to its municipal concerns, subject to the Constitution and general laws of this state."

This section was readopted in essentially the same form in Const 1963, art VII, § 22.

The Home-Rule Act as it now stands includes: "Each charter shall provide: * * * For the public peace and Health and for the safety of persons and property." MCL 117.3(j); MSA 5.2073(j). In other words, before 1908:

> "municipal corporations exercised only such powers as were expressly granted to them by the legislature * * *.
>
> * * * [U]nder [the 1908] Constitution and our home-rule cities act, cities may exercise substantially greater powers essential to local self-government than they previously were allowed to exercise." *Dooley v Detroit,* 370 Mich 194, 207, 210; 121 NW2d 724 (1963).[5]

See also *Gallup* and *City of Saginaw,* 170 Mich 195; 135 NW 1060 (1912). The Home-Rule Act is to be liberally construed. *Mikelsavage v Detroit,* 343 Mich 566; 73 NW2d 266 (1955); *1426 Woodward Avenue Corp v Wolff,* 312

Mich 352; 20 NW2d 127 (1945); *Detroit v Recorder's Court Judge,* 104 Mich App 214; 304 NW2d 829 (1981), *lv den* 413 Mich 866 (1982). In *People v Sell,* 310 Mich 305, 315; 17 NW2d 193 (1945), the Supreme Court ruled that "[E]xcept as limited by the Constitution or by statute, the police power of Detroit as a home rule city is of the same general scope and nature as that of the State." See also *Talley v Detroit,* 54 Mich App 328, 334; 220 NW2d 778 (1974). In *Cady v Detroit,* 289 Mich 499, 514; 286 NW 805 (1939), *app dis* 309 U S 620; 60 S Ct 470; 84 LEd 984 (1940), the Supreme Court defined police power expansively:

> "Ordinances having their purpose regulated municipal development, the security of home life, the preservation of a favorable environment in which to rear childen, the protection of morals and health, the safeguarding of the economic structure upon which the public goods depends, *the stabilization of the use and value of property,* the attraction of a desirable citizenship and fostering its permanency are within the proper ambit of the police power. Changes in such regulations must be sought through the ballot or the legislative branch." (Emphasis added.)[6]

The police power is elastic and changes shape as varying social conditions demand. *Michigan Canners & Freezers Assoc, Inc v Agricultural Marketing & Bargaining Board,* 397 Mich 337; 245 NW2d 1 (1975); *Sell, supra,* 310 Mich 316.

Although even a home-rule city does not have power concurrent with the Legislature and in fact needs at least statutory authorization to pass such ordinances,[7] we rule that defendant does generally have the power to require an inspection before a home owner may sell his one or

two-family residence. Such an inspection deters fraud and helps enforce the city's building code. Both the means and goal are validly within defendant's police power. The Home-Rule Act by itself is specific enough to grant defendant the authority to enact such an ordinance.[8]

Not only does defendant normally have the power to enact 124-H, §§ 12-7-1 *et seq.*, but the ordinance does not conflict with any statute. Michigan's first housing code, 1917 PA 167, contained the following provision:

> "The provisions of the act shall be held to be the minimum requirements adopted for the protection, welfare and safety of the community. Nothing herein contained shall be deemed * * * to prevent any city * * * from enacting and putting in force from time to time ordinances and regulations imposing requirements higher than the minimum requirements laid down in this act; nor shall anything herein contained be deemed to prevent such ordinances and regulations, remedies and penalties similar to those prescribed herein. And every city * * * is empowered to enact such ordinances and regulations and to prescribe for their enforcement." § 8.

Every housing code since has had a similar provision.[9] Clearly, under the standard enunciated in *People v Llewellyn,* 401 Mich 314; 257 NW2d 902 (1977), *cert den* 435 US 1008; 98 S Ct 1879; 56 LEd 2d 390 (1978), there has been no preemption.

Plaintiff takes the position that the ordinance conflicts with the statutes in two ways. First, she argues that the ordinance is invalid because the standards used for the point-of-sale inspections are lower than those required by MCL 125.408; MSA 5.2778. We disagree. The city may continue to enforce state-mandated requirements by

other, more standard means. The particular inspection method challenged here is aimed at the specific practice of fraudulent conveyance of homes with serious structural and other deficiencies. This supplemental form of housing regulation is not expressly forbidden by statute. Such fraudulent transactions pose an obvious threat to the health and welfare of defendant's citizens, and an ordinance directed against them is within the authority of the City of Detroit.

Second, she claims that the ordinance violates MCL 565.5; MSA 26.524 by imposing an implied warranty "that the dwelling conforms with the inspection guidelines." In her complaint, plaintiff alleged that she had contracted to sell her property and that the implied warranty had thus arisen from the sale. However, such contracts are specifically excluded from the definition of "conveyance" as used in MCL 565.5; MSA 26.524. *Weeks v Slavik Builders, Inc,* 24 Mich App 621, 628; 180 NW2d 503 (1970), *aff'd* 384 Mich 257; 181 NW2d 271 (1970).

Plaintiff also argues that defendant lacks authority to collect its inspection fee. However, MSA 438.31a; MSA 19.15(a) expressly authorizes it: "A charge for inspection required by a local unit of government shall be paid by the seller and shall not be charged to the borrower."

Plaintiff arguments are therefore unconvincing.

DUE PROCESS—UNCONSTITUTIONAL TAKING OF PROPERTY

The term "property" as used in the Due Process Clause "includes not only title and possession, but also the rights of acquisition and control, the right to make

any legitimate use or disposal of the thing owned, such as to pledge it for a debt, or to sell or transfer it." *Rassner* 45 (1941). The mere fact that property itself has not been physically taken does not necessarily mean that the Due Process Clause has not been violated: "where the value is destroyed by the action of the government, or serious injury is inflicted to the property itself, or exclusion of the owner from its enjoyment, * * * it is a taking within the * * * Constitution." *Pearsall v The Bd of Supervisors of Eaton County,* 74 Mich 558, 561; 42 NW 77; 4 LRA 193 (1889). See also *Buckeye Union Fire Ins Co v Michigan,* 383 Mich 630, 641-642; 178 NW2d 476 (1970).

On the other hand:

> "'not every destruction or injury to property by governmental action has been held to be a "taking" in the constitutional sense.' *Armstrong v United States,* 364 US 40, 48, 4 L Ed 2d 1554, 80 S Ct 1563 (1960). Rather, the determination whether a state law unlawfully infringes a landowner's property in violation of the Taking Clause requires an examination of whether the restriction on private property 'force[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' Id, at 49, 4 L Ed 2d 1554, 80 S Ct 1563. This examination entails inquiry into such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations. * * * When 'regulation goes too far it will be recognized as a taking.'" *Pruneyard Shopping Center v Robins,* 447 US 74, 82-83; 100 S Ct 2035, 2041-2042; 64 L Ed 2d 741, 753 (1980). (Footnote omitted.)

In the present case, the ordinance neither destroys nor reduces the property's value. In fact, if anything, by requiring post-inspection repairs, it enhances value. Rather than preventing the owner from enjoying his or her property, it merely imposes an inspection and a fee. Such a burden on the property holder is light. The inhibition is not on the transfer of property but upon the failure to have the home inspected.

On the other hand, the ordinance ensures that one and two-family dwellings meet certain minimum requirements. The ordinance is defendant's way of ensuring that a seller has more recourse on buying a house less valuable than anticipated than merely stoically accepting the saw *"caveat emptor"*. Moreover, the statute helps combat housing deterioration.

In summary:

> "Rights of property, like all other social and conventional rights, are subject to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in it by the Constitution, may think necessary and expedient. *Holden v Hardy,* 169 U. S. 366 (18 Sup. Ct. 383). Where the question of the facts established is a fairly debatable one, courts accept and carry into effect the opinion of the legislature. *Old Dearborn Distributing Co. v Seagram-Distillers Corp.,* 299 U. S. 183 (57 Sup. Ct. 139, 106 A.L.R. 1476). Courts cannot substitute their opinions for that of the legislative body on questions of policy." *Cady, supra,* 289 Mich 508-509.

The ordinance does not amount to an unconstitutional taking of property without due process.

REVERSED and REMANDED.

/s/ M. J. Kelly
/s/ Harold Hood
/s/ J. H. Shepherd

FOOTNOTES

[1]This ordinance is more fully explained in *Brand v Hartman*, 122 Mich App 326, 330-331, 333; 332 NW2d 479 (1983), *held in abeyance* — Mich —; — NW2d — (1983).

[2]Plaintiff alleges that the inspection fee in her case was $110.

[3]On April 23, 1982, the trial court certified this suit as a class action.

[4]Although the parties, particularly plaintiff, have addressed other reasons why the ordinance is (or why it is not) invalid, we will address only the grounds ruled on by the trial court.

[5]*Dooley* in fact called it a "radical" change. 370 Mich 208, fn4.

[6]In *Cady*, the Supreme Court upheld an ordinance prohibiting parking occupied trailers in trailer camps for more than 90 days per year. It it had interpreted *Clements* the way that plaintiff now requests us to, the Supreme Court in *Cady* could not possibly have upheld the ordinance.

[7]Cases like *Home Owner's, supra, Detroit v Oakland Circuit Judge, supra, Lennane, supra,* and *Titus, supra,* amply illustrate this point.

[8]OAG, 1977-1978, No. 5280, p 393 (March 23, 1978), reached the same conclusion.

[9]The latest code, enacted by 1978 PA 25103, contained the following provision: "This part shall be construed to supplement and not to supercede any powers otherwise vested in local governments. Local governments may adopt ordinances deemed necessary or appropriate to promote the health, safety and welfare of the people of this state." MCL 333.12222; MSA 14.15 (12222), repealed by 1980 PA 431.

STATE OF MICHIGAN
COURT OF APPEALS

---/

JANET BUTCHER,

Plaintiff-Appellee,

-vs-

CITY OF DETROIT,
a Municipal corporation,

and

No. 88909

WESTSIDE MOTHERS
WELFARE RIGHTS
ORGANIZATION, UNITED
COMMUNITY HOUSING
COALITION, and MICHIGAN
LEGAL SERVICES,

Amicus Curiae.

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(Filed July 11, 1986)

BEFORE: B. B. MacKenzie, P.J.; Beasley and C. W. Simon,* JJ.

PER CURIAM

Plaintiff, Janet Butcher, filed this suit claiming that defendant's, City of Detroit, ordinance (124-H §§ 12-7-1, *et seq*) requiring an inspection for one and two family dwellings at the point of sale was unconstitutional. On June 3, 1982, the trial judge granted plaintiff's motion for partial summary judgment, finding that defendant

city lacked authority to pass the ordinance, and that the ordinance constituted a taking of property without due process of law. On appeal, this court reversed the trial judge's grant of partial summary judgment, expressly finding that defendant city had authority to pass the ordinance under its general police powers and that the ordinance did not constitute an unconstitutional taking of property without due process.[1]

However, this court, when deciding the issues involved in the first appeal, expressly refused to address plaintiff's allegations that the ordinance violated equal protection and authorized an unconstitutional search, since the trial judge had not addressed these issues.[2] The case was remanded to the trial court for further proceedings. Subsequently, the Michigan Supreme Court denied plaintiff's application for leave to appeal this court's decision, but expressly ordered the trial court, on remand, to consider plaintiff's remaining challenges to the ordinance. On remand, the trial judge again granted plaintiff's motion for partial summary judgment, again finding that the ordinance constituted a taking of property without due process and additionally finding that the ordinance denied plaintiff equal protection and authorized an unreasonable search. Defendant again appeals as of right.

As stated in this court's prior decision in this case, defendant city's ordinance requires a valid certificate of approval or a valid inspection report from defendant before a person may sell a one or two family residential structure in the city. The ordinance was more fully explained in *Brand v Hartman*,[3] where the court concluded that the ordinance:

"* * * is a pre-sale inspection ordinance which requires that an inspection report and certificate of approval be issued, for a reasonable fee, at sale or transfer except a sale or transfer by lease, mortgage, gift, devise, bequest or lien foreclosure."

In addressing this case for the second time on appeal, we first note that the trial judge erred in finding that defendant city's ordinance constitutes a taking of property without due process of law, in violation of the US Const, Am XIV and Const 1963, art 1, § 17. This court completely reviewed and rejected this claim in the prior opinion issued in this case.[4] Thus, the trial judge could not, upon remand, properly base his grant of summary judgment to plaintiff on this rejected claim.

In this appeal, defendant argues that the trial judge also erred in finding that the ordinance denied plaintiff equal protection of the laws, in violation of US Const, Am XIV and Const 1963, art 1, § 2. Plaintiff, in the trial court, challenged various classifications, exceptions and exemptions provided in the ordinance. Specifically, plaintiff points to the fact that the ordinance only requires inspections for one and two family residential structures located in Detroit, that inspections are required only upon a sale or transfer for consideration, that inspections are not required for transfers to persons who have occupied the property for 12 months prior to the sale or transfer, and that certificates of approval are not required if the purchaser waives tender of the certificate.

Despite plaintiff's arguments on appeal, the standard of review of the classifications, exclusions and exemptions included in the ordinance is clear. This is so since the

ordinance does not provide for any suspect classifications such as race, or quasi-suspect classifications such as gender, nor does it infringe upon any fundamental rights by authorizing takings of property without due process (see discussion above) or by authorizing unreasonable searches (see discussion below).

In *Rouge Parkway Associates v. Wayne*,[5] the Michigan Supreme Court described the applicable equal protection test in this situation where no suspect class or fundamental rights are involved:

"An equal protection analysis, particularly where there is no suggestion of a suspect classification such as race, begins with the principle that the 'burden is on the person challenging the classification to show that it is without reasonable justification' *Manistee Bank & Trust Co v McGowan*, 394 Mich 655, 668; 232 NW2d 636 (1975), and '(s)tatutes are cloaked with a presumption of constitutional validity.' *Id.*, p 667. A statute will be upheld against an equal protection challenge if it contains a classification rationally related to a legitimate governmental interest. *Shavers v Attorney General*, 402 Mich 554, 613; 267 NW2d 72 (1978)."

The legitimate government purpose of the ordinance was described in this court's prior *Butcher* opinion in rejecting plaintiff's due process claim:

"* * * the ordinance ensures that one- and two-family dwellings meet certain minimum requirements. The ordinance is defendant's way of ensuring that a buyer has more recourse on buying a house less valuable than anticipated than merely stoically accepting the saw 'caveat emptor'. Moreover, the ordinance helps combat housing deterioration." *Butcher, supra*, at p 707.

The classifications, exclusions and exemptions are rationally related to these legitimate government purposes

of the ordinance. They are especially related to the legitimate purpose of protecting buyers from latent housing defects and from fraud on the part of a seller. Defendant has rationally concluded that buyers of one and two family residential structures need more protection than more sophisticated purchasers of larger residential structures; that the problem of housing deterioration and the risk of fraud upon sale is higher in the large urban environment of defendant city than elsewhere in the state; that buyers for consideration who plan to reside in the structure need more protection from fraud and latent defects at the time of transfer than do transferees who have not paid consideration for the property (i.e., receive structure by gift, devise, bequest or lien foreclosure), transferees that do not plan to reside in the structure (mortgagees) and transferees that only have a temporary right to possess and do not own the structure (lessees); and that buyers who have resided in the property for 12 months immediately prior to the sale are not as likely to need the protection an inspection provides.

In addition, the ordinance provision which allows a purchaser to waive the tender of a certificate of approval by the seller is not a classification without a rational basis. The seller is still required to have an inspection of the structure. Thus, the waiver of a certificate of approval only occurs after the buyer is aware of any defects in the structure. The exemption rationally allows the purchaser to bargain with the seller at the time of purchase concerning who will pay for bringing the structure into compliance with minimum housing standards. The waiver provision in no way creates a class of sellers of one and two family residential structures who are exempt from the inspection

requirement and the requirement of having the structures brought up to minimum standards, either by the seller or the buyer.

In light of our discussion above, which clearly indicates that the classifications in the ordinance are rationally related to legitimate government interests, we conclude that the trial judge erred in finding that plaintiff, prior to presenting any proofs in this matter, had overcome the presumption of the ordinance's validity and had met the burden of showing that the ordinance was without reasonable justification. In fact, we find that there is no genuine issue of material fact that the classifications in the ordinance are rationally related to a legitimate government interest and further find that plaintiff could not possibly overcome the presumption of the ordinance's constitutional validity at trial. Therefore, we conclude that defendant city is entitled to judgment as a matter of law on plaintiff's equal protection claim.

Defendant in this appeal also argues that the trial judge erred in finding that the ordinance authorized an unreasonable search, in violation of US Const, Am IV and Const 1963, art 1, § 11. We agree.

Plaintiff, in the trial court, based her Fourth Amendment argument on cases which, pursuant to *Camara v Municipal Court*,[6] invalidated building inspection ordinances that did not allow a property owner to demand a search warrant prior to the inspection. However, the ordinance in this case does provide that the inspector is required to advise the owner that he or she has the right to refuse entry to an inspector who does not have a search warrant.[7] Ordinances that provide that a warrant is re-

quired upon an owner's refusal to consent to an inspection have been consistently upheld as constitutional.[8] In the situation where a point of sale inspection ordinance provides for a warrant requirement, the *Hometown* court found that the property owner is no longer forced to choose between consenting to a warrantless search or subjecting himself or herself to substantial fines for failure to procure a certificate of inspection. If the property owner refuses to consent to the inspection, the city must procure a warrant in order to gain access to the property. The *Hometown* court concluded that such an ordinance is in accord with the Fourth Amendment proscription of unreasonable searches and seizures.

We agree with the reasoning of the *Hometown* decision, but we do note that the ordinance involved in *Hometown* only required the buyer to obtain a certificate of inspection after a sale or face a fine. The ordinance in *Hometown* did not require a seller to arrange for an inspection prior to the time a legal sale could be made, as does defendant's ordinance. Thus, it appears that defendant's ordinance, despite the provision allowing an owner-seller to demand a search warrant, compels the seller to choose between a warrantless search or no search at all and, thus, no possibility of a legal sale. The right to require a warrant in such a situation, where the owner needs the inspection before he can legally sell the structure, becomes rather meaningless.

However, the safeguards provided by a warrant in the situation presented by the inspections required under defendant's ordinance are also meaningless. Many inspections will occur just prior to sale when the structures are

vacant and the owner's expectations of privacy are relatively low. In addition, the housing inspector has no discretion regarding which structures are to be searched. An inspection under the ordinance only occurs when the owner-seller requests one. The inspection is restricted to the published guidelines required by the ordinance. Thus, both the scope and the timing of the inspection are known by the owner in advance. Furthermore, the inspection has no connection with a criminal investigation. The presence of violations has no punitive consequences for the landlord. In such a situation, we conclude that the inspection process itself effectively provides the assurances and safeguards of a warrant and renders the procurement of a search warrant unnecessary.[9]

In *Dome Realty, Inc v City of Paterson,*[10] the court addressed a Fourth Amendment challenge to a city ordinance, closely analogous to this defendant's, which required landlords to request inspections and obtain certificates of occupancy prior to renting a vacated apartment to a new tenant and concluded:

"United States Supreme Court cases regarding the warrant requirement focus on the increased protection that a warrant affords individual privacy.

" 'The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search. A warrant, by contrast, would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria. Also, a warrant would then and there advise the owner of the scope and objects of the search * * *. [*Marshall v. Barlow's Inc.*, 436 U.S. at 323, 98 S. CT. at 1825-1826 (footnote omitted)]'

"None of the dangers and all of the advantages of this characterization are presently found in the Paterson inspection scheme. A warrant requirement in the ordinance would thus appear to be superfluous. We therefore hold that the Paterson ordinance contains all the necessary protection against unreasonable searches and is not subject to the Warrant Clause of the Fourth Amendment."

Likewise, defendant city's ordinance, as described above, contains all the necessary protection against unreasonable searches and is not subject to the constitutional warrant requirement. Therefore, we conclude that the trial judge erred in finding that defendant's ordinance authorized unreasonable searches in violation of the federal and state constitutions. Again, defendant is entitled to judgment as a matter of law on this issue and dismissal of plaintiff's claim.

REVERSED.

/s/ Barbara B. MacKenzie
/s/ William R. Beasley
/s/ Charles W. Simon, Jr.

FOOTNOTES

1 *Butcher v City of Detroit*, 131 Mich App 698; 347 NW2d 702 (1984), *lv den* 419 Mich 917 (1984).

2 *Id.* at p 701, fn 4.

3 122 Mich App 326, 330-331, 333; 332 NW2d 479 (1983), *revd* 422 Mich 883 (1985).

4 See *Butcher, supra*.

5 423 Mich 411, 421-422; 377 NW2d 748 (1985).

6 387 US 523; 87 S Ct 1727; 18 L Ed 2d 930 (1967).

7 124-H, § 12-7-4.

8 See *Hometown Co-Operative Apartments v City of Hometown*, 515 F Supp 502, 504 (N D. Ill, 1981).

9 See *Dome Realty, Inc v City of Paterson*, 83 NJ 212, 239-241; 416 A2d 334 (1980).

10 *Id.*

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

JANET BUTCHER,

Plaintiff, C. A. No. 81-122948 CZ

vs.

THE CITY OF DETROIT, a
Michigan municipal corporation,

Defendant.

———————/

ORDER GRANTING PARTIAL SUMMARY JUDGMENT, DECLARING DEFENDANT'S ORDINANCE INVALID, AND ENJOINING DEFENDANT FROM FURTHER ENFORCEMENT OF SAID ORDINANCE.

(Filed June 3, 1982)

At a session of the said Court held in the City-County Building, Detroit Michigan on June 3, 1982

PRESENT: HONORABLE JOHN H. HAUSNER
Circuit Judge

Plaintiff, JANET BUTCHER, having instituted the within suit against Defendant, City of Detroit, challenging the validity of Ordinance No. 124-H, and as amended by Ordinance No. 213-H, all as adopted by Defendant; and Plaintiff having brought such action in her individual behalf and on behalf of all members of the class affected by the ordinance, as is more particularly set forth in the Complaint and the First, and Second Amended Complaints; miscellaneous discovery having been taken by counsel for both parties, as appears from the record of this cause;

Plaintiff, by her counsel, Robert E. Butcher, having moved for an order by this Court certifying the within suit to be a true class action under the provisions of GCR 208.1 (1) and for injunctive or alternative relief, and the Court by order dated April 23, 1982 having certified this action as a true class action under the provisions of GCR 208.1 (1), and having held in abeyance a ruling on the balance of Plaintiff's motion: and, Plaintiff having subsequently moved for entry of partial summary judgment on her claim that the subject ordinance is unconstitutional and void, and for appropriate relief; the respective parties having filed briefs and reply briefs, and having appeared before the Court on May 21, 1982 and May 26, 1982 to render oral argument in support of and in opposition to the granting of said motion; and, the Court being fully advised in the premises:

IT IS HEREBY ORDERED AND ADJUDGED, and the Court does hereby determine, that Defendant's Ordinance No. 124-H, as adopted and as amended by Ordinance No. 213-H, is unconstitutional and void, in that the adoption and subsequent enforcement of said ordiance(s) constituted a taking of the property of Plaintiff and the members of the class without due process of law, contrary to Sec. 17 of Art. I of the Michigan Constitution of 1963 and the 14th Amendment to the United States Constitution and, further, that Defendant was, under the law of the State of Michigan, without either express or implied authority or delegated authority to either regulate or restrict the sales of one or two family residential structures within its boundaries, and certainly not for the purposes which are claimed or appear on this record;

IT IS FURTHER ORDERED that Plaintiffs' Motion that any notice to the members of the class hereinafter required in this action be made by or at the expense of Defendant is hereby GRANTED, since the unresolved meritorious issues in this action are affirmative defenses raised by Defendant under which Defendant seeks to prevent a refund of fees paid to it under the subject ordinances, and the Court determines that the burden of putting the individual members of the class on notice as to the fact that Defendant is asserting rights which affect the members of the class and the costs of such notice should be borne by Defendant.

IT IS FURTHER ORDERED that a plan for notification of the members of the class and proposed forms of any such notices shall be prepared by Defendant and submitted to this Court for review and approval within 30 days of the date of entry of the Order, on Plaintiff's Motion for Second Partial Summary Judgment with copies being served upon opposing counsel;

For the reasons that Ordinance No. 124-H, and as amended by Ordinance No. 213-H, has been found unconstitutional and void by this Court and that further enforcement thereof thus being inappropriate, DEFENDANT, CITY OF DETROIT, AND EACH OF ITS OFFICERS, AGENTS, SERVANTS, ATTORNEYS, AND/OR EMPLOYEES IS HEREBY PERMANENTLY ENJOINED AND RESTRAINED FROM:

(1) IN ANY MANNER ENFORCING CITY OF DETROIT ORDINANCE NO. 124-H, AS AMENDED BY ORDINANCE NO. 213-H, OR EITHER ORDINANCE INDIVIDUALLY.

(2) COLLECTING ANY FEE UNDER THE PROVISIONS OF ORDINANCE NO. 124-H, AS AMENDED BY ORDINANCE NO. 213-H, OR EITHER OF THEM.

(3) ISSUING CERTIFICATES OF APPROVAL OR REQUIRING THE FILING OR SECURING OF AFFIDAVITS IN ANY MANNER REQUIRED BY SAID ORDINANCES, OR BY EITHER OF THEM.

(4) ATTEMPTING TO REGULATE THE SALE OF ANY ONE OR TWO FAMILY RESIDENTIAL STRUCTURES WITHIN THE BOUNDARIES OF THE CITY OF DETROIT, UNDER A CLAIM OF AUTHORITY FROM SUCH ORDINANCE.

(5) INSTITUTING CRIMINAL PROSECUTION, OR CONTINUING THE CRIMINAL PROSECUTION, OF ANY PERSON, FIRM OR CORPORATION FOR ALLEGED VIOLATION OF ANY OF THE PROVISIONS OF DETROIT ORDINANCE NO. 124-H, AS AMENDED BY ORDINANCE NO. 213-H, OR EITHER OF SUCH ORDINANCES.

/s/ John H. Hausner
CIRCUIT JUDGE

STATE OF MICHIGAN
IN THE CIRCUIT COURT OF THE
COUNTY OF WAYNE

JANET BUTCHER,

Plaintiff,

-vs- No. 81 122 948 CZ

CITY OF DETROIT, a
municipal corporation,

Defendant.

BENCH OPINION

PROCEEDINGS HAD in the above-entitled matter before the HONORABLE JOHN H. HAUSNER, Judge, at Courtroom 406 Lafayette Building, Detroit, Michigan, commencing on Friday, November 15, 1985.

APPEARANCES:

ROBERT E. BUTCHER, Esq.,
On behalf of the Plaintiff

TIMOTHY DOWNS and THOMAS SEROWIK, Esqs.,
On behalf of the Defendant

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EXHIBITS

Identification	Marked	Received
None		

Detroit, Michigan
Friday, November 15, 1985
(2:20 p.m. in open court.)

* * *

The Court: This is the case of Janet Butcher versus City of Detroit, case number 81122948 CZ.

Plaintiff is present and represented by counsel, Mr. Butcher?

Mr. Butcher: Yes, Your Honor.

The Court: City of Detroit is present and represented by counsel?

Mr. Downs: Yes, Your Honor.

The Court: Introduce yourself so we'll know who is here.

Mr. Butcher: Robert Butcher on behalf of the plaintiff.

Mr. Downs: I am the counsel on behalf of the City.

The Court: The Court has, as I said in the past, spent much time on this. In fact, I was out of town on two days for court business and I really lived with this case for two nights reading and reviewing everything.

The Court is of the opinion that there are really four cases that are dispositive of it, two of them really binding on this Court and two not binding on this Court, but the Court finds that they are persuasive by the force of their logic. And those cases are *Camara* versus *Municipal Court Of The City And County Of San Francisco,* 387 U.S. 523, although I am using the lawyers edition, second version.

Norman See versus *City of Seattle* 387 US 541, also using lawyers edition of that.

Wilson—those are both 67 cases. May 5th, 1976. They were decide in companion cases. And *Wilson* versus *Cin-*

cinnati, which is found at 346 North Eastern Reporter, 2d series, page 666, or it would be 46 Ohio State 2d 138. That's a Supreme Court of Ohio case.

And *Sokolov* versus *Village of Freeport,* which would be found at 420 North Eastern Reporter 2d, page 55 or 52, New York 2d, 341. This is Courts of Appeals of New York, being their highest court.

And the *Camara* case, the Court overruled by a six-Justice majority the prior decision of *Frank* versus *Maryland;* it specifically overruled it. In that case, while awaiting trial on criminal charge of violating the San Francisco Housing Code, and because the appellate refused to permit building inspectors to inspect his residence without a warrant, the appellant was brought, was criminally charged and the defendant brought a action for—excuse me, appellant-defendant brought a action for writ of prohibition to be issued to the criminal court alleging that such a inspection was unconstitutional on its face. And the Superior Court of California denied the writ, the District Court of Appeals affirmed, and the Supreme Court of California denied a petition for hearing.

On appeal, the Supreme Court of the United States vacated the judgment below. In an opinion, as I said, by Justice White, expressing the views of six members of the court, it was held that under the Fourth Amendment the defendant, that is Mr. Camara, who is the appellant, had a constitutional right to insist that inspectors obtain a warrant to search, and that he may not constitutional be convicted for refusing to consent to inspection. And they specifically overruled *Frank* versus *Maryland,* which was the law prior to that, and under which law the action would have been permissible:

It's interesting to note, because I see Mr. Downs here, that I had a similar case really before me in which he represented the City people who were being charged innumerous of cases of the 36th District Court that really so the an injunction from the court to stop it. The Court did not ultimately rule on that and I don't know what happened because they improperly brought the case before me. That was my ruling, Mr. Downs and it should have gone through a blind draw so some other Judge got it.

Mr. Downs: The Court injunction that this Court issued is still in place. We are up to the Court of Appeals. It's turned into a very interesting procedural matter.

The Court: The reason I mentioned that is because it really almost—those things are going on. We can't sit here in a vacuum. I know about it because it came before me. I issued a injunction merely until the Judge to whom it should properly been assigned could review it in depth because they improperly got me—they didn't go through blind draw. And the Court believes that of course, we should follow the normal processes.

But it's interesting to note that it's still in place and you are before the Court of Appeals. So maybe all of these will be combined eventually.

As I said last time, I think counsel was here, in my ten years as Judge this is the most important case I have had as far as constitutional principles are involved.

It's interesting, and I want to review these four cases because in this case, as I said, Mr. Camara brought the action alleging that he was awaiting trial on criminal charge of violating the San Francisco Housing Code by refusing to permit a warrantless inspection of his residence, and he

wanted a writ of prohibition, which is really an injunction to the criminal court, because the ordinance authorizing such inspections he claimed were unconstitutional all on the face. And Mr. Camara argued throughout the litigation that the ordinance was contrary to the Fourth and Fourteenth Amendment of the United States Constitution and is applicable to the state through the 14th Amendment, and that it authorized municipal official to enter a private dwelling without a search warrant and without probable cause to believe that a violation of the Housing Code exist therein.

And he took the position that therefore, he could not be prosecuted under the Code for refusing to permit a inspection unconstitutionally authorized by their very ordinance. And the Supreme Court, having concluded, when this opportunity was available to them, that *Frank* versus *Maryland,* to the extent that it sanctioned such warrantless inspections must be overruled, they reversed the California courts and specifically overruled *Frank* versus *Maryland*. And they pointed out, as we all know, but it always bears repeating, that Fourth Amendment provides the right of the people to be secure in their houses—I don't mention all the other things because that's not involved here—against unreasonable searches and seizures, shall not been violated, and no warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched.

He pointed out that the basic purpose of that amendment was to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. And they pointed out again, the obvious, but worth repeating, that Fourth Amendment is enforceable against the states under the Fourteenth Amendment. In other

words, Michigan may adopt a standard more strict than the national standard but it cannot adopt one less strict than the national standard.

And they pointed out in that case that a governing principle justified by history and by current experience, has consistantly been followed in the decisions of the United States Supreme Court, which is excepted in certain carefully defined classes of cases, a search of private property without proper consent is unreasonable unless it has been authorized by a valid search warrant.

And they said the right of officers to thrust themselves into a home is also a grave concern not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonable yield to right of search is, as a rule to be decided by judicial officer, not by a policeman a or government enforcement agent.

And the Court said, as the City has argued here, we may agree that a routine inspection of the physical condition of private property is less hostile intrusion than the typical policeman's search for fruits and instrumentality of crime, but they said we cannot agree that Fourth Amendment interest at stake in these inspections are merely peripheral. It is surely anomalous, they say, to say that the individual in his private properties are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.

They said, for instance, even the most law-abiding citizen has a very tangible interest in limiting the circumstances upon which the sanctity of his home may be broken by official authority. And they pointed out that this ordi-

nance, like the Detroit ordinance, like the ordinance in Ohio and the one in New York, and like most regulatory laws, fire health and housing codes are enforced by criminal processes.

And finally, as this case, *Camara,* demonstrates, it says, refusal to permit an inspection is itself a crime, punishable by a fine or even by jail sentence. And they pointed out that the Frank majority and the appellee in this case, the governmental bodies, reasserts two justifications for permitting administrative health and safety inspections without a warrant.

First they argued that these inspections are designed to make the least possible demand on the individual occupant. And that was argued by Mr. Craig two weeks ago. I think he also almost used the exact word.

In addition, they said that the warrant process could not function effectively in this field and a, the a, Court said that these arguments unduly discount the purposes behind the warrant machinery contemplated by the Fourth Amendment. He pointed out that only by refusing entry and risking a criminal conviction can the occupant at present challenge the inspector's right to search. The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which the Court has consistently circumscribed by a requirement that a disinterested party warrant the need to search, namely a judicial officer.

They said they simply cannot say that the protection provided by the warrant procedure are not needed in this context; broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may only be invoked at the risk of a criminal penalty.

They pointed out that the final justification suggested for warrantless administrative searches is that public interest demand such a rule. That was also one of the arguments of the City of Detroit. They said the question is not, at this stage at least, whether these inspections may be made, but whether they may be made without a warrant. And they said the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.

And then they put in their own summary and said, in summary they hold that administrative searches of the kind at issue here, and of the kind at issue in the case before me, are significant intrusions upon the interests protected by the Fourth Amendment and that such searches when authorized and conducted without a warrant proceeding, lack traditional safeguards which the Fourth Amendment guarantee to the individual, and that the reasons put forth in *Frank* verse *Maryland* and in other cases for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendment protections.

And they pointed out, which I think is important, specially when we get to the equal protection side of it, they pointed out at 939, that, page 939 of the lawyers edition, there is unanimous agreement among those most familiar with this field that the only effective way to seek universal compliance with minimum standards required by municipal codes is through routine periodic inspections of all structures.

And they said that the agency's decision to conduct an area inspection is unavoidable based on it's appraisal of conditions in the area as a whole, not on its knowledge of conditions in each particular building.

And they said that a number of persuasive factors combine to support the reasonableness of area code-enforcement inspections, which by unanimous agreement is only way to do it, for such programs have a long history of public and judicial acceptance.

And they said, and I mention this because this will be important also in the equal protection phase of this, which is before me, the passage of a certain period without inspection might of itself been sufficient in a given situation to justify the issuance of a warrant.

And they said, having concluded that the area inspection is a reasonable search of private property within the meaning of the Fourth Amendment, it is obvious that probable cause to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting a area inspection are satisfied with respect to a particular dwelling.

And this is important for the same reason when I get to it. They said such standards my be based upon the passage of time, the nature of the building, for example, a multi-family apartment house or one or two family dwelling, or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling.

And they come to the conclusion that the appellant, Mr. Camara, had a constitutional right to insist that the inspector obtain a warrant to search, and that Mr. Camara could

not constitutionally be convicted for refusing to consent to the inspection.

Now, a companion case of the *Norman See* versus *City of Seattle,* which I have already given the cite for. Also Justice White writing the opinion of the court for six members held that the Fourth Amendment that they had applied in Camera to prohibit such searches of residential buildings also applied, forbids warrantless inspections of commercial structures as well as private structures.

In that case, the defendant had been convicted in the State of Washington Court for refusing to permit a representative of the City of Seattle Fire Department to inspect ~~his~~ locked commercial warehouse without a warrant. And the Supreme Court, again of Washington, affirmed that decision, and the United States Supreme Court reversed.

I want to just, there is a few things that are worthy of note in this case. Again, in the Seattle case, the inspection was conducted as part of a routine periodic city-wide canvass—city-wide—to obtain compliance with City fire code. It was still struck down. *Camara* was area wide. And they said in *Camara,* and I want to see what this said. They held—so it's not just my view—they said, in *Camara* we held that the Fourth Amendment bars prosecution of a person who has refused to permit a warrantless code-enforcement inspection of his personal residence. That's the law in 1967 and that's the law today, as I understand the case law in the constitution.

The only question which the case presents is whether *Camara* applies to similar inspections of commercial structures which are not used as private residences. They said yes it does. They said, we see no justification for so re-

laxing Fourth Amendment safeguards where the official inspection is intended to aid enforcement of laws prescribing minimum physical standards for commercial premises. Having previously held this, they see no justification for so relaxing Fourth Amendment safeguards for the official inspections entitled to aid enforcement of laws prescribing minimum physical standards for residential premises.

And they said, as we explained in *Camara,* a search of private houses is presumptively unreasonable. So there is no presumption to the City of validity. It is presumptively unreasonable if conducted without warrant.

And they said, the businessman too has that right placed in jeopardy. Businessmen, like an occupant of a residence, they said, has a constitutional right to go about his business free from unreasonable government official entry upon his private commercial property. The businessmen too has that right to place in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant.

And they pointed out that although there are administrative subpoenas that an agency can issue to look at records or look at facilities, that before anyone from those facilities, which they have upheld, before anyone can be punished under throws procedures, the subpoenaed parties may obtain judicial review of the reasonableness of the demand prior to suffering any penalties for refusing to comply. That type of opportunity is denied to people under these types of ordinances. They pointed out that the decision to enter and inspect will not—will not—be the

product in those administrative subpoenas of the unreviewed discretion of the enforcement officer in the field.

He said, we therefore conclude that administrative entry without consent upon the portion of commercial premises which are not open to the public may only be compelled through prosecution of physical force within the framework of a warrant procedure.

And they therefore said the appellant, in this case say, appellant-defendant, may not be prosecuted for exercising his constitutional right to insist that the fire inspector obtain a warrant for entry upon appellant's locked warehouse. As they say in Detroit, such prosecutions are going on of people selling homes.

Now let's get to *Wilson* versus City of Cincinnati. I see no difference between the Cincinnati ordinance and the Detroit ordinance that would affect the applicable law. I find them to be identical. Identical.

In that case, the Court—and it's interesting that in Cincinnati, and the same thing will be found in the New York case, that the Court of Common Pleas in Cincinnati, which is like the Circuit Court, found the ordinance unconstitutional, invalid and granted it injunctive relief, as this Court had. The Court of Appeals in Ohio reversed and the Supreme Court of Ohio though affirmed really the action taken by the trial Court and reversed the Court of Appeals. And the Court held that an ordinance modifying and amending the City Code by requiring a seller of housing either to consent to warrantless search or face the possibility of criminal penalties was constitutionally unenforceable as coercing the waiver of Fourth Amendment

rights. They said that ordinance was also invalid insofar as providing that a seller did not warrant that a structure was substantial compliance with building code where the buyer has actual knowledge of deficiencies in the struture, but also providing that except under certain circumstances the buyer is presumed not to have knowledge of any deficiencies. They said that presumption was invalid for arbitrariness. I find no substantial differences between that ordinance and the ordinance before me today.

And the Court in its syllabus said that where a municipal ordinance requires the owner of real property to tender a certificate of housing inspection to a prospective buyer, as Detroit does, and such certificate may be obtained only by allowing a warrantless inspection of the properties, the imposition of a criminal penalty upon the owner's failure to tender the certificates violates the owner's rights under the Fourth Amendment of the United States Constitution.

And the trial Court in Ohio held that the ordinance was unconstitutional and enjoined the City from acting under this provision.

Now, now, the Court on page 667 of the North East citation that I have already given said, from an examination of ordinance one can see that the homeowner, prior to entering into a correct for the sale of property, is required to tender to prospective buyer a Certificate of Housing Inspection. The failure to so comply, with three exceptions, renders the seller subject to the criminal penalty provided in subsection F and Ordinance Number 557-1973.

And they pointed out that the seller is obviously favored with a serious dilemma: either he must consent to

a warrantless search or face the possibility of criminal penalties. And they point out that a valid consent involves a waiver of constitutional rights and cannot be lightly inferred; hence, it must be voluntary and uncoerced either physically or psychologically.

And they said in the case before us, and I find the Detroit case to be the same, the coercion represented by the sole alternative of criminal prosecution, clearly negates any consent that may be inferred from the allowance of the inspection, and therefore the validity of such searches upon the basis of consent is not sustainable.

And I so find in this case as a matter of law, and they said, as I find, a finding that the professions of the ordinance cannot be constitutionally enforced is further warranted in light of the decision of the United States Supreme Court in *Camara* versus *Municipal Court,* the case to which I have already alluded and we have discussed.

And they pointed out, in that, in Federal decisions the right of officers to thrust themselves into a home is also a grave concern not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must be reasonable yield to right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

And they pointed out, as I have, that the *Camara* decision rejected arguments similar to those advanced by the City in that case and in this case, that those types of warrantless administrative searches can be justified on the ground that they make minimal demands on occupants

that warrants in such cases are unfeasible or that area inspection programs cannot function under reasonable search warrant requirements.

And the final issue they raise is the validity of the presumption in the subsection. And they pointed out for statutory presumption to be sustained, there must be a natural and logical connection in light of common experience, between the fact proved and fact to be presumed. And the City of Detroit ordinance has a large presumption in it. That the ordinance—and they found the presumption there to be arbitrary and invalid, even the Court of Appeals did.

Lastly let's get to *Sokolov* versus *Village of Freeport.* It's a 1981 case. Takes up through a period of 14 years of consistent court rulings, and that's the highest court of the State of New York. And in that case, the facts are weaker than in this case, but still the ordinance was declared unconstitutional.

In that case, the trial judge declared invalid and unconstitutional a village ordinance that imposed the penalties upon a landlord for renting his premises without first consenting to warrantless search. And the Court held that that violated the property owner's Fourth Amendment rights.

And the Court pointed out on page 56 of the North Eastern Reporter, the issue presented for our determination is a constitutionality of a municipal ordinance which provides, effectively, that a landlord is required to consent to warrantless inspection of his property in order to obtain a rental permit.

And they said, we hold today that the imposition of a penalty upon a landlord for renting his premises without first consenting to warrantless search violates the property owner's Fourth Amendment rights. And in this case, there was a rental ordinance enacted by the Village of Freeport which required that the landlord obtain a rental permit prior to leasing any part of a residential dwelling. And under that provision, the permits had to be renewed every two years or each time a vacancy occurs. And an owner could not rerent his property without submitting to inspection and obtaining certification that premises were free from all violations. And if the person violated, that the City could impose penalties of $250 a day for each day the building was occupied without a rental permit. This in substance, the landlord is subject to a fine of $250 a day for failure to consent to warrantless administrative inspection.

And in this case, in addition, the appellate, that is, the landlord. were being prosecuted in criminal action for failure to obtain rental permits under the ordinance. And they pointed out, they disowned the previous case of *Loventhal* versus *City of Mount Vernon*. They said in that case the Appellate Division upheld an apparently similar ordinance, concluding that it did not have effect of coercing plaintiffs into consenting into warrantless inspections in derogation of their constitutional rights, and that the proposed inspections were not unreasonably intrusive. They said, we reach an opposite conclusion, and specifically struck down that decision.

And they said in their examination of the constitutionality of the ordinances, they rely primarily on the

holding and principles set forth in *Camara* versus *Municipal Court,* 1967 decision to which this Court has already referred.

And they stated that a search of private property without property consent is unreasonable unless it has been authorized by a valid search warrant.

And they pointed out that in the *Marshall* versus Barlow's Inc., case, 436 U.S. 307, the Court, consistent with *Camara,* and consistent with *See,* held that Congress could not authorize the unconsented search of the work area of any employment facility within OSHA's jurisdiction for safety hazards without a warrant.

So the Court even went beyond *Camara* and *See* in that case, or consistently extended it. They said, initially, the village argues that failure to consent to warrantless inspection is not punishable under the ordinance but only the renting of the property without a permit. Much like the reasoning in the Court of Appeals in this case, and other issues that are not before me.

But they said, in this instance the property owner's consent is not voluntarily given, as it is clearly a product of coercion. A property owner cannot be regarded as having voluntarily given his consent to a search where the price he must pay to enjoy his rights under the Constitution is the effective deprivation of any economic benefits from his rental property.

They said, additionally, we note that the village may not compel the owner's consent to a warrantless inspection upon the theory that these searches are a burden which a property owner must bear in exchange to open his property to the general public for rental.

They said, it is beyond the power of the State, not just the City but state, to condition an owner's ability to engage his property in the business of residential rental upon his forced consent to forego certain rights guaranteed to him under the Constitution.

They cite, interestingly enough, La Fave Search and Seizure, which books I also have in my library.

And they said the right to continue the exercise of privilege granted by the State cannot be made to depend upon the grantee's submission to a condition prescribed by the State which is hostile to the provisions of the federal Constitution.

And this Court finds, of course, that the State ordinance is also hostile to the federal Constitution. I also find it hostile to sections of the Michigan Constitution. Even if it were not, the Michigan Constitution must yield to the federal. You can have a higher standard but not a lower one.

The respondent village also seeks to justify the ordinance by urging that the intrusion is minimal because any search of the premises will occur while the premises are vacant. And they said this is reasonably unsafe.

They point out, there may be, in actuality, be no time in which the premises are vacant and accessible to unobtrusive inspection. Furthermore, even if the premises were vacant during the inspection, they would nevertheless be a serious intrusion upon the interest of the owner deserving of constitutional protection, even a vacant premise.

They said the interest for which an owner seeks the protection of a warrant is not necessarily the prevention

of possible inconvenience to his tenants, but may be his own interest in self protection, an interest found to be of significant importance in *Camara*.

They also point out because of this expectation-type of argument, once you have the ordinance, they said we merely observe that a search which is well publicized, and, in fact, inspectable, nevertheless may be a serious intrusion into the privacy of an individual.

They said, an ordinance which compels consent to a warrantless search cannot be upheld except in certain carefully limited circumstances, none of which are applicable here.

So the Court finds that as to Fourth Amendment argument, that ordinance violates the United States Constitution Fourth Amendment as applicable to the State under the Fourth Amendment.

The Court also finds it violates Michigan Provision—is it necessary to name it by number? If necessary, I will do it.

Mr. Butcher: I should not think so.

Mr. Downs: Not necessary.

The Court: Let's get on to the equal protection argument.

The Court spent a lot of time weighing that one also, and the *Camara* and the others that I have cited, I have supporting languages in there that I thought was important because it shows that there is a denial of equal protection also. And the purpose of the ordinance as stated by the City, although they state different things at

different times, is to preserve the housing stock, ensure minimum standards of housing. and also times they have said, after the Court of Appeals said it, to prevent fraudulent transfers.

All right, now, if we look at the ordinance, under that ordinance it defies logic to show the reasonable classification is that you check the homes that are sold for a consideration only in which the buyer doesn't waive it or it hasn't been occupied for a year when it's given for, without consideration, or let's say through probate, something of that nature. Those—there is no basis in reason to think that people who sell houses for a consideration are more likely to have homes that do not meet the minimum standard or more likely to convey fraudulently than people who get houses by the other methods. The reason I said that is because logic dictates what Mr. Butcher said when he argued last time. A person who will want to sell a home will want to get the highest market value he can. He is motivated to have the home in the best possible shape. A person who dies and is being sent through probate, what does he care about condition of that home. He has no motivation. He's beyond the reach of this court or any court. There is no basis in reason to think that a person who signs a waiver is less susceptible to fraudulent transfers than a person who doesn't sign a waiver.

There is no basis in reason as far as I can determine that the goal of the ordinance will be accomplished by this method. For example—and Mr. Craig admitted this during the oral argument last time. Under this ordinance, one can evade ever having a inspection under this ordinance by getting waivers, by renting with an option to buy for

a year. A home may never in its entire lifespan ever be checked for those purposes. While a home that is sold for consideration could be checked 12 times a year as, many times as it's sold in a year. I see no rational basis for making that distinction and placing the burden on those members of a class of owners of one and two-family homes who sell for consideration, and excepting others who occupy one and two-family homes where there is a transfer in title. So I find it unconstitutional as equal protection also.

Now, both sides when they were here last time wanted, were eager, and I am going to do nothing to stop you, to just have this matter go up on final order. That was the wish of the plaintiff and the City last time.

Mr. Butcher: Maybe I can express it a little differently. I think under the Court Rules, Your Honor can make his ruling and declare that part as final.

The Court: That's the only thing left for me to decide, according to both sides.

Mr. Butcher: Well, there is—

The Court: What else is there left for me to decide, notification of the class and things of that nature?

Mr. Butcher: That would be true. The question of return of the fees and that sort. But, I don't know that, assuming Your Honor is ruling with the plaintiffs here—

The Court: I am.

Mr. Butcher: —That the City would want—

Mr. Downs: Fair assumption.

Mr. Butcher: Maybe they want to do it like they did last time and go up before there is any notice sent out to the class or something.

Mr. Downs: I can represent to the Court that I think both Mr. Butcher and ourselves are eager to take this up to the —

The Court: I am willing to do it—I don't want to go through a lot of things here that will increase cost. I am willing to certify this if that will help you.

Mr. Downs: That would probably be satisfactory factor, Your Honor. I don't know if it's necessary or not.

Could I suggest this: we of course, are going to have to order the transcript, which is lengthy, and obviously an opinion which has taken quite a bit of the Court's thinking process behind it, and then a written order will have to be entered. Perhaps that will give Mr. Butcher and ourselves time to consult as to most appropriate way to structure the final order to meet our mutual interest in getting this up to the Supreme Court of Appeals.

The Court: I am willing to do whatever will can to expedite it, because based upon our findings—I have to act in good conscience to myself—I can't allow you to enforce an ordinance that I find is violative of peoples' most sacred rights, to be secure from warrantless searches and denial of equal protection of the laws. So I want to get this resolved one way or the other. But if we are going to sit down—if you are going to enter that order, it would seem that I would have to. I could not fail to stay the operation of this ordinance. I have to stay it.

Mr. Butcher: I think that you have to do that, Your Honor.

Your Honor has not specifically stated. Is Your Honor ordering a return of the fees at this point?

The Court: I have made a finding that the—that there is no consent. I have made that, so I would order a return of the fees. It's a question now of how we would notify the class. I haven't done that. I would have to sit down with counsel to find, which is an inexpensive but still reasonable way. I wouldn't want to impose a burden on the City to do it in some way that is not substantially more effective than a inexpensive way, understand that.

Mr. Downs: Your Honor, if I can suggest this: I think it would be helpful, if we had an opportunity to order the transcript now on an emergency expedited basis. Mr. Butcher and the City probably will, with Mr. Craig, probably will have to draw up a proposed order for entry. I think there could be a dual task at that point, one figuring out the language, that I am sure we will have no trouble to mutually agree upon; and secondly, figuring out the best way to structure it so that this can be taken quickly up to the Court of Appeals.

I am just thinking in terms of the timing. I pose the first question is to make inquiry as to the court reporter.

The Court: I am willing to work with both counsel. My decision should be clear that I have declared it unconstitutional for two reasons, and because it's unconstitutional the Court cannot allow it to continue to be enforced, so I have to enjoin it.

Mr. Downs: I understand that. I think that should be done in conjunction with the knowledge that we, of

course, will have to do an a emergency to try to avoid as much disruption as possible and all work to go along those lines.

Mr. Butcher: I am sure that Mr. Craig and I can work out an appropriate order within a week, Judge.

The Court: Well, courts speak through written orders and decrees, so there is no effect until an order is entered. My oral order has no effect, and there has to be a written order. And Counsel in this case on both sides are very competent professional people. Not only Mr. Craig and you, Mr. Butcher, but Mr. Downs, and also, Mr. Serowik, who has been here from day number one. I have lived with this longer than anyone else and he has done a outstanding job for the City. So I am saying today that I am willing to do whatever else counsel thinks advisable for us to do that will minimize cost and burden for both sides. I am willing to work with both of you on that.

Mr. Butcher: Only thing I can suggest, as offhand matter before we can put a provision in there which would say notice would have to go out for 25 days or 30 days, pending their getting a review by the Court of Appeals on a request, that we don't send notices out at this time.

The Court: You mean notices to the class, something of that sort.

Mr. Downs: I don't think either party at this point sees a particular need to send out notices.

Mr. Butcher: I don't think the City of Detroit would be agreeable to immediately stopping prosecutions.

The Court: I am willing to do that. I thought of this on notices also, but before I would make any decision, I would want to meet with Counsel, because City of Detroit might be in a position to say, Judge, here is the most economical and best way to give notice if they are going to have to give notice. They are going to have to give notice because of my finding. They will have to bear that expense.

We could do several things. We can sit down first and agree on a way of notice. I am willing to even do that. We could say that if there has been no stay of the Court's order within "X" amount of time, we will meet and sit down and the order for notices will issue, all right. That's another way we could do it.

Mr. Butcher: Let me—I will try to meet with Mr. Craig on Tuesday morning, Your Honor.

Mr. Downs: I am just wondering, do you think we can extend upon the Court to pencil in a proposed meeting with counsel and Court?

The Court: Friday, when?

Mr. Downs: Next Friday.

The Court: My Fridays are really bad, let me tell you. I was able to squeeze you in because of a cancellation, but if I can squeeze you in, I will do it.

Mr. Downs: Let the Court give us.

The Court: The 29th, I am going to be gone the last week of this November and the first week of December.

Mr. Downs: How about 25th and 26?

The Court: 22nd is good at two o'clock.

Mr. Downs: Can we pencil the Friday.

The Court: We had appeal.

Mr. Butcher: Two o'clock next Friday.

The Court: Two o'clock.

I will tell you, it's important to be here on time because you see it takes a while to get the paper work done on pro cons. Usually we have a half hour to sit down and then I can take the pro cons and we can meet again.

Mr. Butcher: I will meet with Mr. Craig and Mr. Downs before then and we will work up something.

The Court: Even if there is a reason for us to meet during the week, I am willing to do it even after 4:30. I think even a pretrial on the 20th.

Mr. Butcher: We had at 4:30.

The Court: Wednesday is a day we meet with Supreme Courts Judges.

The Court: All I am saying is this: if you want to meet after 4:30, Monday, Tuesday, or Thursday. I am willing to do that. I won't have a court reporter, but we can sit down. But if there is something I can help you on or be of assistance with, I am willing to do that.

Mr. Butcher: I have an appearance Monday, but Tuesday or Thursday I could handle.

Mr. Downs: Okay.

Mr. Butcher: I will meet with Mr. Craig in the mean time, and we will call before would he comes over.

The Court: If you call me in advance, I will try to be available at 4:30 except that one day.

(Conclusion of proceedings in this matter.)

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

JANET BUTCHER,

Plaintiff,

vs. Case No. 81-122948 CZ

THE CITY OF DETROIT, a
Michigan municipal corporation,

Defendant.

_____/

ORDER GRANTING FINAL PARTIAL SUMMARY JUDGMENT, DECLARING DEFENDANT'S ORDINANCE INVALID, AND ENJOINING DEFENDANT FROM FURTHER ENFORCEMENT OF SAID ORDINANCE

At a session of said Court held in the City of Detroit, Wayne County, Michigan, on November 22, 1985.

PRESENT: HONORABLE JOHN H. HAUSNER
Circuit Judge

Plaintiff, JANET BUTCHER, having instituted the within suit against Defendant, CITY OF DETROIT, challenging the validity of Ordinance No. 124-H, and as amended by Ordinance No. 213-H, all as adopted by Defendant; and Plaintiff having brought such action in her individual behalf and on behalf of all members of the class affected by the ordinance, as is more particularly set forth in the Complaint and the First and Second Amended Complaints; miscellaneous discovery having been taken by counsel for both parties, as appears from

the record of this cause; Plaintiff, by her counsel, Robert E. Butcher, having moved for an order by this Court certifying the within suit to be a true class action under the provisions of 1963 GCR 208.1(1) and for injunctive or alternative relief, and the Court by order dated April 23, 1982 having certified this action as a true class action under the provisions of 1963 GCR 208.1(1), and having held in abeyance a ruling on the balance of Plaintiff's motion; the Court having entered its Order Granting Partial Summary Judgment under date of June 3, 1982, which Order was reversed by Order of the Court of Appeals dated February 6, 1984; and Plaintiff having subsequently moved for entry of partial final summary judgment on the equal protection and search and seizure constitutional portions of her claim, as directed by the Court of Appeals and the Michigan Supreme Court, and for appropriate relief; the respective parties having filed briefs and reply briefs and having appeared before the Court on November 1, 1985, to render oral argument in support of and in opposition to the granting of said motion; and the Court having rendered its bench opinion on November 15, 1985, and, the Court being fully advised in the premises:

IT IS HEREBY ORDERED AND ADJUDGED, and the Court does hereby determine, that Defendant's Ordinance No. 124-H, as adopted and as amended by Ordinance No. 213-H, is unconstitutional and void, in that the adoption and subsequent enforcement of said ordinance(s) constituted a taking of the property of Plaintiff and the mem-

bers of the class without due process of law, contrary to Sec. 17 of Art. I of the Michigan Constitution of 1963 and the Fourteenth Amendment to the United States Constitution. Such unconstitutional taking of property without due process of law was accomplished by Defendant by denying to Plaintiff and each member of the class the equal protection of the laws guaranteed them by Sec. 2 of Art. I of the Michigan Constitution of 1963 and the Fourteenth Amendment to the United States Constitution by designating as being subject to the said ordinance(s) only those persons who transfer title to real property within the Detroit city limits for a consideration, and where the purchaser has not resided on the purchased premises for more than 12 months prior to the date of transfer, and has not otherwise waived compliance with the ordinance. The Court finds the selection and designation of such class, which produces approximately 12,000 inspections per year in a city which has more than 350,000 one and two family residential structures, to be completely without any rational basis under whatever equal protection test or review standard the court employs. Alternatively, under Defendant's claim that the class is comprised of owners of one and two family residential structures, it is obvious that not all members of the class are being equally treated under the ordinance(s), either as to the requirements for inspections or subsequent occupancy, which provisions facially violate both constitutional equal protection clauses.

IT IS FURTHER ORDERED and determined by this Court that the subject ordinance, and as amended, violates Sec. 11 of Art. I of the Michigan Constitution of 1963 and the Fourth Amendment to the United States

Constitution, each of which protects the people from unreasonable searches and seizures of their persons, houses, papers and possessions, in that Defendant by such ordinance(s) attempts to legislate unto itself a right of entry onto private residential property and a right to collect an uncontrolled inspection fee without first establishing before a neutral magistrate probable cause to enter upon and search each individual premises, and thereby accomplishes an unconstitutional taking of property without due process of law. Defendant impermissibly provides in the ordinance for enforcement of its provisions by penal sanctions, consisting of possible fines and/or imprisonment, and by civil sanctions, consisting of imposing implied warranties as to the condition of premises, where the property owner transfers title for a consideration without first having obtained an inspection certificate and without paying the specified inspection fee.

A person may not be penalized or disadvantaged for exercising a constitutional right. The government may not lawfully anticipate the issuance of a search warrant and thereby circumvent the judicial review mandated by each constitution. Whether or not any unit of government attempts to establish in the abstract an administrative standard which could serve as a basis, in lieu of probable cause, for permitting an administrative inspection of residential premises, such administrative standard is, at most, only a guide or an additional fact to assist the magistrate in acting upon any facts presented in support of any request for a search warrant presented to such judicial officer.

The Court having determined that the imposition and collection of the inspection fees from each member of the

class heretofore certified by the Court was an unconstitutional taking of property without due process of law which was accomplished in violation of the equal protection clauses of both the State and the Federal Constitutions and in violation of the search and seizure clauses of both such constitutions, and further, that the imposition and collection of such fees was accomplished by impermissible duress, IT IS HEREBY ORDERED that Defendant City of Detroit is liable to repay to each and every member of the class the inspection fees collected by it pursuant to either Ordinance 124-H, or under Ordinance 124-H as amended by Ordinance 213-H, with statutory 12% judgment interest from the date of institution of this suit or, as to inspection fees paid after the date of institution of this suit, from the last day of the month in which the payment of each later inspection fee was received by Detroit, such interest to be compounded annually as provided by statute.

IT IS FURTHER ORDERED that Defendant shall, within 60 days after entry of this Order, prepare and file with the Court a report showing the total number of inspections conducted under the subject ordinance(s); the total amount of money collected as inspection fees by Defendant from all members of the class; detailed interest computations, by month and year, due under this Order through December 31, 1985; any proposal which Defendant might have for carrying out the return of inspection fees to members of the class, should Detroit want to undertake that activity under the Court's supervision; and Defendant's proposal for notifying members of the class of this action, along with the form of any proposed notices.

Such proposal shall include both notice by publication and notice by U.S. Mail, the expense of which is to be borne by Defendant.

IT IS FURTHER ORDERED that Plaintiff shall have 30 days, after receipt by her from Defendant of the items specified in the preceding paragraph, to file a petition for attorney fees and expenses; and, to make alternate proposals regarding the means of notification of the individual members of the class and the means for accomplishing the actual distribution of refunds.

For the reasons that Ordinance No. 124-H, and as amended by Ordinance No. 213-H, has been found unconstitutional and void by this Court and further enforcement thereof thus being inappropriate, DEFENDANT CITY OF DETROIT, AND EACH OF ITS OFFICERS, AGENTS, SERVANTS, ATTORNEYS, AND/OR EMPLOYEES IS HEREBY PERMANENTLY ENJOINED AND RESTRAINED FROM:

(1) IN ANY MANNER ENFORCING OR ATTEMPTING TO ENFORCE CITY OF DETROIT ORDINANCE NO. 124-H, AS AMENDED BY ORDINANCE NO. 213-H, OR EITHER ORDINANCE INDIVIDUALLY.

(2) COLLECTING ANY FEE UNDER THE PROVISIONS OF ORDINANCE NO. 124-H, AS AMENDED BY ORDINANCE NO. 213-H, OR EITHER OF THEM.

(3) ISSUING CERTIFICATES OF APPROVAL OR REQUIRING THE FILING OR SECURING OF AFFIDAVITS IN ANY MANNER REQUIRED BY SAID ORDINANCES, OR BY EITHER OF THEM.

(4) INSTITUTING CRIMINAL PROSECUTION, OR CONTINUING THE CRIMINAL PROSECUTION, OF ANY PERSON, FIRM OR CORPORATION FOR ALLEGED VIOLATION OF ANY OF THE PROVISIONS OF DETROIT ORDINANCE NO. 124-H, AS AMENDED BY ORDINANCE NO. 213-H, OR EITHER OF SUCH ORDINANCES.

IT IS FURTHER ORDERED that, as provided in MCR 2.604(A), there being no just reason for denying entry of Final Judgment as to such claims, the Court hereby directs entry of a Final Judgment as to the claims disposed of in this Order.

/s/ JOHN H. HAUSNER
Circuit Judge

Approved as to form:
/s/ Robert E. Butcher
(P 11478)
Attorney for Plaintiff and the Class
/s/ Roger E. Craig
(P 12308)
Special Counsel for Defendant

A True Copy
/s/ James R. Killeen, Clerk
By: District Clerk

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 17th day of April in the year of our Lord one thousand nine hundred and eighty-five.

Present the Honorable
G. MENNEN WILLIAMS,
Chief Justice

73657
(71)

CHARLES L. LEVIN,
JAMES L. RYAN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
DOROTHY COMSTOCK RILEY,

Associate Justices

JANET BUTCHER,

Plaintiff-Appellant,

v

SC: 73657
COA: 64900
LC: 81-122-948-CZ

CITY OF DETROIT, a Municipal Corporation,

Defendant-Appellee.

On order of the Court, the motion for reconsideration of this Court's order of September 7, 1984 is considered, and it is DENIED, because it does not appear that the order was entered erroneously. On remand, the trial court must still consider the remaining challenges of the plaintiff to the ordinance.

STATE OF MICHIGAN—ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same

with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing this 17th day of April in the year of our Lord one thousand nine hundred and eighty-five.

(SEAL)

/s/ Corbin R. Davis, Clerk

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 10th day of February in the year of our Lord one thousand nine hundred and eighty-seven.

Present the Honorable
DOROTHY COMSTOCK RILEY,
Chief Justice

79144

CHARLES L. LEVIN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
DENNIS W. ARCHER,
ROBERT P. GRIFFIN,

Associate Justices

JANET BUTCHER,

Plaintiff-Appellant,

v

CITY OF DETROIT, a municipal corporation,

SC: 79144
COA: 88909
LC: 81-122-948 CZ

Defendant-Appellee.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are

not persuaded that the questions presented should be reviewed by this Court.

Boyle, J., would grant leave to appeal.

STATE OF MICHIGAN—ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 10th day of February in the year of our Lord one thousand nine hundred and eighty-seven.

(SEAL)

/s/ Corbin R. Davis, Clerk

U. S. CONSTITUTION
Amendment IV [1791]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U. S. CONSTITUTION
Amendment XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ORDINANCE NO. 124-H

ORDINANCE NO. 124-H
(Corrected Copy)

CHAPTER 12
ARTICLE 7

RESTRICTION ON SALES OR
CONVEYANCE OF ONE OR TWO
FAMILY DWELLINGS

AN ORDINANCE to amend Chapter 12 of the Code of the City of Detroit by adding a new Article; to be known as Article 7, prohibiting the sale or conveyance of one (1)

or two (2) family dwellings without either a Certificate of Approval being issued therefor by the Buildings and Safety Engineering Department, a Waiver of Compliance being executed by the purchaser or an Affidavit of Non-Occupancy being sworn to by the purchaser.

IT IS HEREBY ORDAINED BY THE PEOPLE OF THE CITY OF DETROIT:

Section 1. That Chapter 12 of the Code of the City of Detroit be amended by adding a new Article to be known as Article 7, Restriction on Sales or Conveyance of One (1) or Two (2) Family Dwellings.

Section 12-7-1. For the purpose of this article:

(a) Department means the Buildings and Safety Engineering Department.

(b) Dwelling means a 1 or 2 family residential structure.

(c) Investment Property means any dwelling, except (1) a dwelling held by an agency of the City, State or Federal Government. (2) A dwelling which has been occupied in whole or in part by the seller or transferor for a 6 consecutive month period within 1 year immediately prior to the sale or transfer. (3) A dwelling held by an estate.

(d) Sale or Transfer means to convey any interest in a dwelling except by lease, mortgage, gift, devise, bequest or lien foreclosure. The sale or transfer shall be deemed to occur upon the transfer of title. The execution of a land contract, or the exercise of an option to purchase a dwelling.

Section 12-7-2. It shall be unlawful to sell or transfer, or act as a broker for a sale or transfer of a dwelling unless:

(a) A valid certificate of approval is tendered to the purchaser or transferee at the time of the sale or transfer; or

(b) It is a sale or transfer for the purpose of occupancy by the purchaser of a dwelling which is not held by the seller or transferer as an investment property or held by a governmental agency and (1) the seller or transferer delivers to the purchaser or transferee at least 10 days prior to the sale or transfer a valid inspection report; and (2) the parties execute a waiver of tender of a certificate of approval in accordance with the provisions of this ordinance; or

(c) It is a sale or transfer of a dwelling which is not to be occupied by the purchaser or transferee and the purchaser or transferee certifies by sworn affidavit (1) that he will repair the dwelling, (2) that the dwelling will never be occupied by him and he will not rent nor allow any person to occupy the property without first obtaining a certificate of approval, except occupancy at the time of the sale or transfer may be continued but in no case for a period longer than 12 months; and (3) the required rehabilitation permit will be obtained; or

(d) It is a sale or transfer of a dwelling by a governmental agency to be occupied by the purchaser or transferee and the purchaser or transferee has received at least 10 days prior to sale or transfer a copy of a valid inspection report and certifies by sworn affidavit that he will not occupy or allow the dwelling to be rented or otherwise occupied without first obtaining a certificate of approval or a temporary occupancy permit.

Section 12-7-3. The provisions of this ordinance shall not apply to (1) a sale or transfer by one governmental

agency to another; (2) a sale or transfer to a purchaser or transferee who has occupied the property at least 12 months immediately prior to the sale or transfer, provided the sale or transfer is not pursuant to the exercise of an option held by the seller or transferer; (3) a sale or transfer which has occured prior to the effective date of this ordinance; or (4) a sale or transfer where the seller or transferor and the purchaser or transferee have signed a purchase agreement prior to the effective date of this ordinance.

Section 12-7-4. The department shall issue a certificate of approval only after it has inspected the dwelling and found it conforms with the guidelines described in Section 13-7-6. The inspection report provided for in Section 12-7-2 shall be issued only after the department has inspected the dwelling, and shall note any deficiencies from the guidelines described in Section 12-7-6.

Applications for certificates of approval or inspection reports shall be available at the department or other designated agencies and shall be filed with the department. The department shall set reasonable fees for inspections made pursuant to this ordinance.

Section 12-7-5. A certificate of approval or inspection report shall be valid for 6 months from the date of issuance, except that for any dwelling for which a certificate or report is issued that was occupied at the time of issuance. The certificate or report shall be valid during the period of continuous occupancy, but not to exceed 24 months. A certificate of approval is not a warranty or guarantee that there are no defects in the dwelling nor shall the city be held responsible for defects not noted in the inspection report.

Section 12-7-6. The department shall prepare a list of inspection guidelines to be used in inspection relating to the enforcement of this article. The guidelines shall constitute the complete scope of repairs required for the issuance of the certificate or to be noted in an inspection report. The guidelines shall not be effective until approved by City Council. The inspection guidelines shall be issued to the applicant for certificate of approval or inspection report and made available free of charge to the general public. The city shall notify the general public, as the City Council shall recommend by resolution that the guidelines exist and are available.

Section 12-7-7. A waiver of tender of a certificate of approval as provided in Section 12-7-2(b) or an affidavit as provided in Section 12-7-2(c) or 12-7-2(d) shall only be obtainable from the department or other designated city agencies and shall only be executed by the sellor or transferor and the purchaser or transferee at the department after the inspection report has been reviewed with the purchaser or transferee by a representative of the depar ent. A signed copy of all waivers and affidavits shall be filed with the department at the time of execution.

Section 12-7-8. Should the department, upon inspection, determine that there are conditions which constitute an imminent danger to health and safety it may order the conditions to be remedied and may limit or prohibit occupancy where appropriate. In all other cases the department shall not penalize any person for any deficiencies discovered in the dwellings as a result of an inspection conducted in accordance with this ordinance whether the sale or transfer does, or does not, occur except as occupancy is restricted in Sections 12-7-2(c) and 12-7-2(d).

Section 12-7-9. The City Council shall establish an advisory committee composed of eleven (11) city residents to review the operation of the ordinance, rules, regulations and standards adopted pursuant thereto, to hear and evaluate complaints in its implementation, and to recommend to City Council changes in this ordinance and the adoption of rules, regulations and standards. The advisory committee shall consist of two (2) members from the department, three (3) from the real estate industry and six (6) members-at-large. Members of the committee shall serve at the pleasure of City Council and vacancies shall be filled by City Council.

Section 12-7-10. Any sale or transfer in violation of this ordinance shall be illegal. Any sale or transfer in violation of this ordinance or any failure to adhere to statements, made in the waiver of compliance form provided for in Section 12-7-2(b) or the affidavits provided for in Sections 12-7-2(c) and 12-7-2(d) shall be a misdemeanor.

Section 12-7-11. A penalty created by this ordinance shall not limit or derogate any other statutory or common law right or action.

Section 2. This ordinance is hereby given effect on June 30, 1976.

(JCC P. 566-69, March 10, 1976)

Passed June 9, 1976.

Approved June 22, 1976.

Published June 25, 1976.

Effective June 30, 1976.

Re-published: July 16, 1976.

JAMES H. BRADLEY
City Clerk

ORDINANCE NO. 213-H

CHAPTER 12
ARTICLE 7

AMENDMENT TO
ALL SALES ORDINANCE
124-H

AN ORDINANCE to amend Chapter 12, Article 7 of the Code of the City of Detroit, Michigan as amended, by amending Sections 12-7-1, 12-7-2, 12-7-4, 12-7-7 and 12-7-10, to exempt dwellings held by the County from the definition of investment property to permit a temporary occupancy not to exceed six months for sales to investors, to permit the issuance of a certificate of approval when an amount equal to twice the cost of repair is placed in escrow, to add a requirement that sellers, transferors and occupants be advised that they have a right to refuse inspections without a search warrant, to permit the execution of an investor affidavit to occur at places other than the Department, to add an implied warranty for sales or transfers in violation of Chapter 12, Article 7 and to clarify the penalty for violations.

IT IS HEREBY ORDAINED BY THE PEOPLE OF THE CITY OF DETROIT:

Section 1. That Chapter 12, Article 7 of the Code of the City of Detroit, be amended by amending Sections 12-7-1, 12-7-2, 12-7-4, 12-7-7 and 12-7-10 to read as follows:

Section 12-7-1

For the purpose of this article:

(a) Department means the Buildings and Safety Engineering Department.

(b) Dwelling means a 1 or 2 family residential structure.

(c) Investment Property means any dwelling, except (1) a dwelling held by an agency of the City, County, State or Federal Government. (2) a dwelling which has been occupied in whole or in part by the seller or transferor for a 6 consecutive month period within 1 year immediately prior to the sale or transfer. (3) a dwelling held by an estate.

(d) Sale or Transfer means to convey any interest in a dwelling except by lease, mortgage, gift, device, bequest or lien foreclosures. The sale or transfer shall be deemed to occur upon the transfer of title, the execution of a land contract, or the exercise of an option to purchase a dwelling.

Section 12-7-2

It shall be unlawful to sell or transfer, or act as a broker for a sale or transfer of a dwelling unless:

(a) A valid certificate of approval is tendered to the purchaser or transferee at the time of the sale or transfer; or

(b) It is a sale or transfer for the purpose of occupancy by the purchaser of a dwelling which is not held by the seller or transferor as an investment property or held by a governmental agency and (1) the seller or transferor delivers to the purchaser or transferee at least 10 days prior to the sale or transfer a valid inspection report; and (2) the parties execute a waiver of a TENDER

OF a certificate of approval in accordance with the provisions of this article; or

(c) It is a sale or transfer of a dwelling which is not to be occupied by the purchaser or transferee and the purchaser or transferee certifys by sworn affidavit (1) that he will repair the dwelling; (2) that the dwelling will never be occupied by him and he will not rent nor allow any person to occupy the property without first obtaining a certificate of approval or a temporary occupancy permit, which shall not exceed six (6) months and may be obtained upon inspection and the absence of any hazardous conditions, except occupancy at the time of the sale or transfer may be continued but in no case for a period longer than 12 months; and (3) the required rehabilitation permit will be obtained; or

(d) It is a sale or transfer of a dwelling by a governmental agency to be occupied by the purchaser or transferee and the purchaser or transferee has received at least 10 days prior to sale or transfer a copy of a valid inspection report and certifys by sworn affidavit that he will not occupy or allow the dwelling to be rented or otherwise occupied without first obtaining a certificate of approval or a temporary occupancy permit.

Section 12-7-4

The department shall issue a certificate of approval only after it has inspected the dwelling and found it conforms with the guidelines described in Section 12-7-6; provided that, in the absence of any hazardous conditions a certificate may be issued when an amount of money equal to twice the estimated cost of required repairs is placed in escrow pursuant to departmental guidelines, the certificate

to be annotated to indicate this basis for issuance. The inspection report provided for in Section 12-7-2 shall be issued only after the department has inspected the dwelling, and shall note any deficiencies from the guidelines described in Section 12-7-6.

Applicants for certificates of approval or inspection reports shall be available at the department or other designated agencies and shall be filed with the department. The department shall set reasonable fees for inspections made pursuant to this ordinance.

The department shall advise the seller, transferor or the occupant of a dwelling which must be inspected pursuant to the provisions of this ordinance that he or she has the right to refuse entry to the department without a search warrant.

Section 12-7-7

A waiver of tender of a certificate of approval as provided in Section 12-7-2(b) or an affidavit as provided in Section 12-7-2(c) or 12-7-2(d) shall only be obtainable from the department or other designated city agencies, and shall only be executed by the seller or transferor and the purchaser or transferee in the presence of a representative of the department after any inspection report, waiver of affidavit has been reviewed with the purchaser or transferee by the representative of the department; provided that, any purchaser or transferee executing an affidavit under section 12-7-2(c) need not execute same in the presence of a representative of the department if the purchaser or transferee has executed such an affidavit in the presence of a representative of the department in the

previous 12 months. A signed copy of all waivers and affidavits shall be filed with the department.

Section 12-7-10

In any sale or transfer in violation of this article, the seller or transferor shall be deemed to warrant that the dwelling conforms with the inspection guidelines promulgated pursuant to section 12-7-6. Any person, being owner or agent, who sells or transfers a dwelling in violation of this article or any failure to adhere to statements made in the waiver of compliance form provided for in Section 12-7-2(b) or in the affidavits provided for in Section 12-7-2(c) and 12-7-2(d) shall be subject to the penalty provided for in section 1-1-7 of this code.

Section 2. All ordinances or parts of ordinances in conflict herewith be and the same are hereby repealed.

Section 3. This ordinance is hereby given immediate effect.

(JCC p. 2115-17, October 5, 1977)

Passed: November 16, 1977

Approved: November 25, 1977

Published: December 2, 1977

Effective: December 2, 1977

JAMES H. BRADLEY
City Clerk

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§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.